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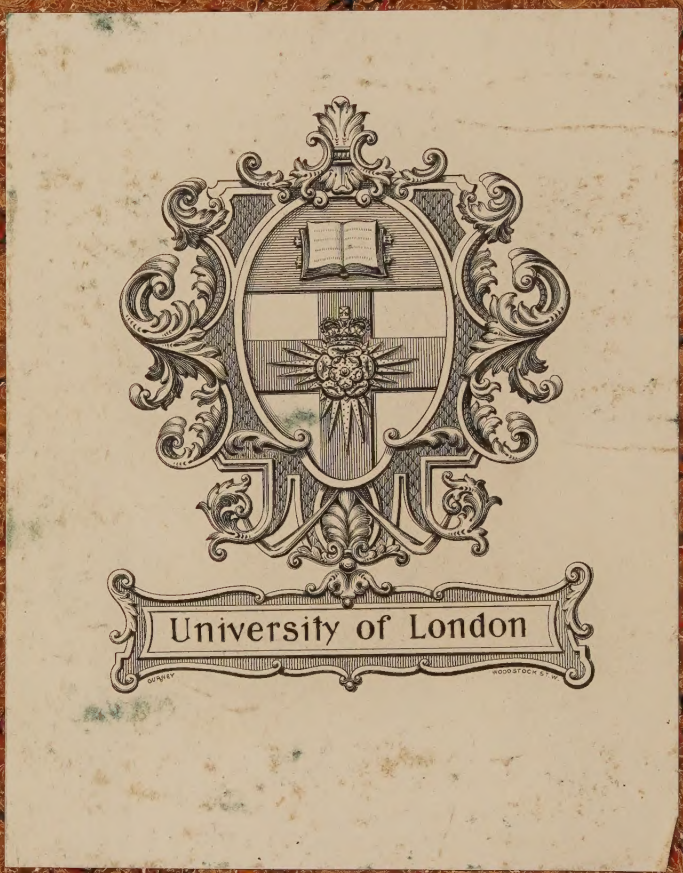

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1905.

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MEMORANDA.

January. THE RIGHT HONOURABLE SIR FRANCIS JEUNE, *President of the Probate, Divorce and Admiralty Division of the High Court of Justice, resigned his office on account of ill-health. He was afterwards created a Peer by the title of* BARON ST. HELIER *of St. Helier in the Island of Jersey, but died on April 9 at his residence in Harley Street at the age of* 62.

Feb. 1. THE HONOURABLE SIR JOHN GOREIL BARNES, *one of the Justices of the High Court of Justice, was appointed President of the Probate, Divorce and Admiralty Division, and was afterwards sworn of the Privy Council.*

HENRY BARGRAVE DEANE, ESQ., K.C., *was appointed one of the Justices of the High Court of Justice, and was afterwards knighted.*

Nov. 29. SIR RICHARD COUCH, *formerly a Member of the Judicial Committee of the Privy Council, died at his residence,* 25, *Linden Gardens, in his* 89*th year.*

Dec. 2. SIR ALFRED WILLS, *one of the Justices of the King's Bench Division of the High Court of Justice, resigned his office, and was succeeded by* HENRY SUTTON, ESQ., *Junior Counsel of His Majesty's Treasury.*

THE RIGHT HONOURABLE LORD LINDLEY *resigned his office as one of the Lords of Appeal in Ordinary, and was succeeded by* THE RIGHT HONOURABLE JOHN ATKINSON, *Attorney-General for Ireland.*

ERRATA AND ADDENDA.

Page	*Line*	*For*	*Read*
68	foot-note (7)	L. R. 15 Q. B. 85.	15 Q. B. D. 85.
69	12 and 13 from the bottom	delete "the Government of New South Wales" and the rest of the paragraph; and substitute "there would be a new tariff which would come into force on October 8. It did in fact come into operation at 4 P.M. on that day."	
241	foot-note (4)	[1893] 1 Q. B. 713.	[1893] 1 Q. B. 715.
283	„ (4)	[1900] 2 Ch. 60.	[1900] 2 Ch. 605.
369	1 of catch-words	insert "*Judiciary*" after "*Commonwealth.*"	
„	1 of head-note	although	assuming.
„	4 of head-note	after "and" insert "that"; for "therefrom" read "thereunder."	
375	foot-note (3)	9 R. R. 66.	9 R. R. 76.
„	„ (4)	12 App. Cas. 631.	12 App. Cas. 727.
„	„ (8)	[1897] 1 Ch. 576.	[1897] 1 Ch. 536.
462	„ (2)	1 D. F. & J. 208.	1 De G. & J. 208.

NOTE.—*Grimond* (*or Macintyre*) v. *Grimond*, p. 124. The opinions of the Lord Ordinary and of the Second Division of the Court of Session are reprinted at p. 603 of this volume.

[1904] A. C.
ERRATA.

GENERAL ASSEMBLY OF FREE CHURCH OF SCOTLAND *v.* LORD OVERTOUN.

Page	*Line*	*For*	*Read*
517	6 from bottom	"large majorities of the congregations adhered to the minority in the Assembly"	"some congregations adhered by decisive majorities to the," &c.
527	10 from top	"Revolutionary"	"Revolution."
529	11 „ „	after "Court of Session" insert full stop.	
545	6 „ „	", and which"	"; this was the Act which."
585	3 „ „	"absoluto"	"absolute."
606	13 „ „	"casual"	"causal."

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

CITY AND SOUTH LONDON RAILWAY COMPANY . . . . . } APPELLANTS;

AND

RECTOR AND CHURCHWARDENS OF THE UNITED PARISHES OF ST. MARY WOOLNOTH AND ST. MARY WOOLCHURCH HAW, AND THE ECCLESIASTICAL COMMISSIONERS FOR ENGLAND . . . . . } RESPONDENTS.

H. L. (E.)
1904
Dec. 15.

Lands Clauses Acts—Compensation—Severance and injuriously affecting Land—Site of a Church—Construction of Special Railway Act—Union of Benefices Act, 1860 (*c.* 142)—*Lands Clauses Act*, 1845 (*c.* 18), *s.* 63.

By their special Acts which incorporated the Lands Clauses Act, 1845 (except where expressly varied), a railway company were empowered to take land adjoining a church and an easement or right of using the subsoil under the church, but were prohibited from taking any part of the church.

H. L. (E.)

1904

CITY AND SOUTH LONDON RAILWAY v. UNITED PARISHES OF ST. MARY WOOLNOTH AND ST. MARY WOOLCHURCH HAW.

The company having given notice to treat for part of the adjoining land and the subsoil under the church :—

Held, that upon the true construction of the special Acts there was nothing to shew an intention that the church should remain in situ in perpetuity, and that in assessing the compensation to be paid by the company the arbitrator was entitled to award compensation under s. 63 of the Lands Clauses Consolidation Act, 1845, for severance or the injurious affecting of the other lands, upon the basis that the site of the church might under a scheme under the Union of Benefices Act, 1860, or otherwise at some future time cease to be the site of a church and become available for building, and that the arbitrator was at liberty to draw his own conclusion as to when that time would be likely to arrive.

The decision of the Court of Appeal, [1903] 2 K. B. 728, affirmed.

By the appellant company's special Act of 1893 (56 & 57 Vict. c. ccvii.), the Lands Clauses Acts were incorporated except where expressly varied by the special Act, and the company received powers for the compulsory purchase of the site of the church of St. Mary Woolnoth in London, and the land adjoining and held therewith.

By the company's special Act of 1896 (59 & 60 Vict. c. cclii.), s. 7, it was enacted that notwithstanding anything contained in the Act of 1893 the company should not purchase any part of the church but might purchase the surface of such other part of the property as they might require, and an easement or right of using the subsoil under any part of the property of which the surface should not be purchased, including such part of the crypt and foundations of the church as the company might require.

Also that the purchase-money or compensation to be paid by the company for the part of the surface required and for the subsoil and crypt and all other matters of difference should, unless otherwise agreed, be determined by an arbitrator; the arbitrator in assessing the amount to take into consideration the additional liabilities and expenses entailed upon the company in constructing the railway and works without removing the church; the company to make good any damage caused to the structure of the church during the construction of the railway and works or after the completion in consequence of the construction, use, or want of repair thereof.

The company gave the rector and churchwardens notice to treat for part of the surface land which they were empowered to purchase, and for an easement or right of using the subsoil under the remainder of the land including the crypt and foundations of the church.

The arbitrator in his award stated a case raising certain questions for the opinion of the Court. The question material to this report was whether the purchase-money or compensation to be paid by the company for (inter alia) damage (if any) sustained by the severing of the lands taken from the other lands of the rector and churchwardens or otherwise injuriously affecting such other lands by the exercise of the powers of the Acts, was to be assessed upon the basis that the site of the church might, under some Act of Parliament or under a scheme under the Union of Benefices Act, 1860, or otherwise, at some future time cease to be the site of a church and become available for building, and that the arbitrator was at liberty to draw his own conclusion as to when that time would be likely to arrive. Upon this basis the arbitrator awarded a sum including compensation for severance or injurious affection.

Wright J. answered the question in the affirmative, holding that the arbitrator should take into consideration all the circumstances tending to shew when the site would be likely to become available for building. This decision was affirmed by the Court of Appeal (Vaughan Williams, Stirling, and Mathew L.JJ.). (1) The present appeal turned entirely upon the construction of the company's special Acts, no principle of law or construction being at issue. The material sections of the Acts are set out in the report below.

Haldane, K.C., and *J. Eldon Bankes, K.C.* (*P. B. Abraham* with them), for the appellants. The true construction of the special Act of 1896 was that the purchase-money and compensation payable by the appellants should be assessed upon the footing that the church was to remain in situ, and was not available for sale or building purposes under the Union of

(1) [1903] 2 K. B. 728.

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Benefices Act, 1860, or otherwise. The central idea and purpose of the Act of 1896 was that the church should remain as a lasting monument. It would be a great injustice if the appellants after being deprived of the right to purchase and pull down the church should be compelled to pay 136,000*l.* including compensation for severance, seeing that there never can be any severance or injurious affecting of other lands, because the church must always remain as it is. The appellants have incurred great additional expense in constructing a steel table and other permanent supports for the Church. It is unjust that they should pay compensation on the footing that the site is available for building, when they cannot recover any part of their expenditure by turning the surface to account as they might have done under their Act of 1893.

Cripps, K.C. (*Sir Edward Boyle, K.C., Lord Robert Cecil, K.C., C. E. Allan,* and *Joseph Shaw* with him), for the respondents. There is no injustice: the appellants have not to pay for the church or for anything but the land and easement which they have acquired, and compensation for severance or injurious affection. Their additional expenditure in supporting the church has been deducted by the arbitrator from the amount of compensation. The contention made below that the Act of 1896 prevented the church from being ever sold and taken down is unarguable and has not in fact been argued here, and it follows that the arbitrator was entitled to award compensation for severance.

Haldane, K.C., in reply. The only case in which damage for severance would be payable would be if the company acquired the site of the church: but the appellants have not got the site.

EARL OF HALSBURY L.C. My Lords, I am afraid I was one of the persons who misapprehended what the question was when Mr. Haldane's argument was first addressed to your Lordships; but I am now better advised, and it seems to me that the judgments in the Court of Appeal are absolutely unanswerable.

The whole suggestion is made upon a false hypothesis. If the

state of facts had been what I erroneously supposed it to be, that the company had bought and paid for the whole of this site, then I should have thought that it was an extremely unjust thing that they should, after they had bought and paid for it, have withdrawn from them that which by the hypothesis was their own. But it turns out that as a matter of fact they never did pay for it, and all that they are at present called upon to pay for is that which they have got. To deprive the church of the value of its own site because of this particular Act of Parliament seems to me extremely unjust. It has no shadow of foundation in the state of the law. What the appellants are called upon to pay for is that which they have got. The extra expenditure which they have had to incur by reason of making this steel table and avoiding any injury to the church they have been recouped for by the express provision of the Act of Parliament that the extra expenses they had to pay should be "considered"—of course that means deducted from the amount of compensation the company would otherwise have had to pay in respect of that which they have in fact got.

Under these circumstances there is not the least foundation for saying that the church is to deprived of the value of the site which belonged to it. If under ecclesiastical superintendence the church is removed and those entitled to it are to be compensated for it, why should they not be compensated for that which was theirs, and for which by the hypothesis which Mr. Haldane put before us they would never get compensation? It seems to me that that is absolutely untenable.

I see no answer whatever to the judgment of the Court of Appeal, which does appear to me, now I understand the facts, to have dealt with this very point, and to have dealt with it so satisfactorily that I can see no answer to the proposition. Under these circumstances I move your Lordships to dismiss this appeal with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I think the judgment of the Court of Appeal was right.

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LORD ROBERTSON. My Lords, so do I.

LORD LINDLEY. My Lords, so do I.

Judgment of Wright J. and order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, December 15, 1904.

Solicitors: *Donald, McMillan & Mott; Phillips, Son & Thompson.*

[HOUSE OF LORDS.]

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CLYDEBANK ENGINEERING AND SHIPBUILDING COMPANY, LIMITED AND OTHERS . . . . . APPELLANTS;

AND

DON JOSE RAMOS YZQUIERDO Y CASTANEDA AND OTHERS . . . RESPONDENTS.

Contract—Penalty or Liquidated Damages—Time Limit—Waiver.

The Spanish Government contracted with the appellants for the building of four torpedo boats, delivery to be within periods varying from six and a half months to seven and three-quarter months from the date of the contracts. The contracts provided that "The penalty for later delivery shall be at the rate of 500*l.* per week for each vessel." The vessels having been delivered many months after the stipulated period and the price paid, the Spanish Government claimed from the appellants payment of 500*l.* for each week of late delivery:—

Held, affirming the decision of the Second Division of the Court of Session, (1.) that the sum of 500*l.* a week was to be regarded as liquidated damages and not as a penalty, and that the Spanish Government were entitled to recover; (2.) that payment in full of the price of the vessels without reservation was no waiver of the claim for damages for delay in delivery.

APPEAL against a judgment of the Second Division of the Court of Session, Scotland. (1)

The Spanish Government, represented by the respondents,

(1) (1903) 5 F. 1016; sequel to [1902] A. C. 524.

sought to recover from the appellants the penalties alleged to have been incurred by the appellants under a contract dated June 4, 1896, for the construction of two torpedo-boat destroyers, afterwards named *Audaz* and *Osado*, and the penalties alleged to have been incurred by the appellants under another contract dated November 24, 1896, for the construction of two torpedo-boat destroyers, afterwards named *Pluton* and *Proserpina*.

These contracts were entered into between the then chief of the Spanish Royal Naval Commission in London, the commissary of that commission, in the name and representation of His Excellency the Spanish Minister of Marine in Madrid, for the Spanish Government, on the one part, and the appellants (inter alios) James and George Thomson, Limited, engineers and shipbuilders, Clydebank, Scotland, of the other part.

The contracts were for building four torpedo-boat destroyers for the Spanish Government. They contained the following clauses:—

In the first, the contractors "undertake that the said vessels shall be finished, complete and ready for sea, the first vessel in six and three-quarter months, and the second in seven and three-quarter months, from signing of this contract and accompanying specifications and plans."

The second contract dealt with the third and fourth vessels, and promised that these vessels should be delivered in six and a half and seven and a half months respectively. The contracts contained also this clause: "The penalty for later delivery shall be at the rate of 500*l.* per week for each vessel not delivered by the contractors in the contract time."

The two vessels built under the first contract, namely, the *Audaz* and *Osado*, should under the terms of the contract have been delivered on April 23, 1897, respectively. They were, in point of fact, not delivered until March 7, 1898.

The two vessels built under the other contract, namely, the *Pluton* and *Proserpina*, should under the terms of the contract have been delivered on June 14, and July 13, 1897, respectively; but the *Pluton* was not delivered until November 30, 1897, and the *Proserpina* until February 8, 1898.

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The respondents, after receiving delivery, and paying the price of the vessels, claimed under the penalty clause in respect of each vessel; and on June 17, 1903 (1), the Second Division of the Court of Session, affirming the interlocutor of the Lord Ordinary (Lord Kyllachy), allowed a total of 135 weeks' delay, or damages of about 67,500*l.* in all, with interest.

The appellants maintained that the penalty named in the contracts was not truly liquidated damages pre-estimated by the parties as the loss which might be sustained through a breach of the contract, but a penalty in the strict sense of the word, and therefore recoverable only to the extent to which actual loss or damage was proved by the respondents. In this view, the appellants maintained that on the most liberal estimate the only damages proved by the respondents amounted to 3126*l.* 16*s.* 8*d.*

The appellants further maintained that in any event the respondents, by payment without reservation of the whole contract price for each of the vessels, waived all claims to penalties or damages.

The evidence on the point of waiver was, shortly, that there was a strike of all the engineers on the Clyde from July, 1897, to February, 1898; that the weather during the winter 1896–7 was abnormally wet and boisterous; that, the contracts having been completed, the Spanish Government took delivery of the vessels and paid the price without protest or reservation; and, finally, that no specific claim for damages was made until August, 1900, when the appellants had assumed that any claim there might have been had been abandoned.

1904. Nov. 15, 17. *Lawson Walton, K.C.*, and *Ure, K.C.* (with them *Rufus Isaacs, K.C.*, *John H. Tait*, and *Felix Cassel*), (the second and fourth of the Scottish Bar), for the appellants. The clause in question was a penalty clause to be modified in respect of actual loss. The 500*l.* a week was fixed without any discussion as to what would be the probable loss if the vessels were not finished within the time stipulated, and was

(1) 5 F. 1016.

therefore a penalty held in terrorem over the appellants and in no respects a liquidated sum.

Secondly, it was not till six months after delivery of the vessels and payment in full that the claim was intimated; then for a further period of eighteen months nothing was heard of the claim until this action was raised. In the meantime the appellants had transferred their business. In these circumstances the claim must be held to have been waived.

[They commented on *Craig* v. *M'Beath* (1); *Johnston* v. *Robertson* (2); *Forrest & Barr* v. *Henderson* (3); *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (4); *Emslie* v. *Young's Trustees.* (5)]

Dundas, S.-G. for Scotland, and *R. L. Blackburn* (both of the Scottish Bar), appeared for the respondents, but were not called upon.

EARL OF HALSBURY L.C. My Lords, this is a case in which a party to an agreement has admittedly broken it, and an action was brought for the purpose of enforcing the payment of a sum of money which, by the agreement between the parties, was fixed as that which the defenders were to pay in the event that has happened.

Two objections have been made to the enforcement of that payment. The first objection is one which appears upon the face of the instrument itself, namely, that it is a penalty, and not, therefore, recoverable as a pactional arrangement of the amount of damages resulting from the breach of contract. It cannot, I think, be denied—indeed, I think it has been frankly admitted by the learned counsel—that not much reliance can be placed upon the mere use of certain words. Both in England and in Scotland it has been pointed out that the Court must proceed according to what is the real nature of the transaction, and that the mere use of the word "penalty" on the one side, or "damages" on the other, would not be conclusive as to the rights of the parties. It is, I think, not

(1) (1863) 1 M. 1020.
(2) (1861) 23 D. 646.
(3) (1869) 8 M. 187.
(4) (1886) 11 App. Cas. 332.
(5) (1894) 21 R. 710.

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denied now that the law is the same both in England and in Scotland. The different form of its administration gave rise doubtless to the Act of William III. (8 & 9 Will. 3, c. 11), s. 8, which, of course, is that upon which English lawyers rely when this question occurs; but that difference only arises from a difference in the mode of administering in this country the two branches of jurisprudence which we call law and equity, while the Scotch judges had full jurisdiction in each of the Courts to administer justice, and in administering justice to administer it according to both branches of jurisprudence.

We come then to the question, What is the agreement here? and whether this sum of money is one which can be recovered as an agreed sum as damages, or whether, as has been contended, it is simply a penalty to be held over the other party in terrorem—whether it is, what I think gave the jurisdiction to the Courts in both countries to interfere at all in an agreement between the parties, unconscionable and extravagant, and one which no Court ought to allow to be enforced.

My Lords, it is impossible to lay down any abstract rule as to what it may or it may not be extravagant or unconscionable to insist upon without reference to the particular facts and circumstances which are established in the individual case. I suppose it would be possible in the most ordinary case, where people know what is the thing to be done and what is agreed to be paid, to say whether the amount was unconscionable or not. For instance, if you agreed to build a house in a year, and agreed that if you did not build the house for 50*l.*, you were to pay a million of money as a penalty, the extravagance of that would be at once apparent. Between such an extreme case as I have supposed and other cases, a great deal must depend upon the nature of the transaction—the thing to be done, the loss likely to accrue to the person who is endeavouring to enforce the performance of the contract, and so forth. It is not necessary to enter into a minute disquisition upon that subject, because the thing speaks for itself. But, on the other hand, it is quite certain, and an established principle in both

countries, that the parties may agree beforehand to say, "Such and such a sum shall be damages if I break my agreement." The very reason why the parties do in fact agree to such a stipulation is that sometimes, although undoubtedly there is damage and undoubtedly damages ought to be recovered, the nature of the damage is such that proof of it is extremely complex, difficult, and expensive. If I wanted an example of what might or might not be said and done in controversies upon damages, unless the parties had agreed beforehand, I could not have a better example than that which the learned counsel has been entertaining us with for the last half-hour in respect of the damage resulting to the Spanish Government by the withholding of these vessels beyond the stipulated period. Supposing there was no such bargain, and supposing the Spanish Government had to prove damages in the ordinary way without insisting upon the stipulated amount of them, just imagine what would have to be the cross-examination of every person connected with the Spanish Administration such as is suggested by the commentaries of the learned counsel: "You have so many thousand miles of coast-line to defend by your torpedo-boat destroyers; what would four torpedo-boat destroyers do for that purpose? How could you say you are damaged by their non-delivery? How many filibustering expeditions could you have stopped by the use of four torpedo-boat destroyers?"

My Lords, I need not pursue that topic. It is obvious on the face of it that the very thing intended to be provided against by this pactional amount of damages is to avoid that kind of minute and somewhat difficult and complex system of examination which would be necessary if you were to attempt to prove the damage. As I pointed out to the learned counsel during the course of his argument, in order to do that properly and to have any real effect upon any tribunal determining that question, one ought to have before one's mind the whole administration of the Spanish Navy—how they were going to use their torpedo-boat destroyers in one place rather than another, and what would be the relative speed of all the boats they possessed in relation to those which they were getting by

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this agreement. It would be absolutely idle and impossible to enter into a question of that sort unless you had some kind of agreement between the parties as to what was the real measure of damages which ought to be applied.

Then the other learned counsel suggests that you cannot have damages of this character, because really in the case of a warship it has no value at all. That is a strange and somewhat bold assertion. If it was an ordinary commercial vessel capable of being used for obtaining profits, I suppose there would not be very much difficulty in finding out what the ordinary use of a vessel of this size and capacity and so forth would be, what would be the hire of such a vessel, and what would therefore be the equivalent in money of not obtaining the use of that vessel according to the agreement during the period which had elapsed between the time of proper delivery and the time at which it was delivered in fact. But, says the learned counsel, you cannot apply that principle to the case of a warship because a warship does not earn money. It is certainly a somewhat bold contention. I should have thought that the fact that a warship is a warship, her very existence as a warship capable of use for such and such a time, would prove the fact of damage if the party was deprived of it, although the actual amount to be earned by it, and in that sense to be obtained by the payment of the price for it, might not be very easily ascertained—not so easily ascertained as if the vessel were used for commercial purposes and where its hire as a commercial vessel is ascertainable in money. But, my Lords, is that a reason for saying that you are not to have damages at all? It seems to me it is hopeless to make such a contention, and although that would not in itself be a very cogent argument because the law might be so absurd, yet it would be a very startling proposition to say that you never could have agreed damages for the non-delivery of a ship of war although, under the very same words with exactly the same phraseology in the particular contract, you might have damages if it was a vessel used for commercial purposes; so that you would have to give a different construction to the very same words according to whether the thing agreed to be built was a warship or a ship intended for com-

mercial purposes. My Lords, I think it is only necessary to state the contention to shew that it is utterly unsound.

Then there comes another argument which, to my mind, is more startling still: the vessel was to be delivered at such and such a time; it was not delivered, but the fleet the Spanish Government had was sent out at such a time and the greater part of it was sunk, and, says the learned counsel, "If we had kept our contract and delivered these vessels they would have shared the fate of the other vessels belonging to the Spanish Government, and therefore in fact you have got your ships now, whereas if we had kept our contract they would have been at the bottom of the Atlantic." My Lords, I confess, after some experience, I do not think I ever heard an argument of that sort before, and I do not think I shall often hear it again. Nothing could be more absurd than such a contention, which, if it were reduced to a compendious form such as one has in a marginal note, would certainly be a striking example of jurisprudence. I think I need say no more to shew how utterly absurd such a contention is. I pass on to the other question.

It seems to me, when one looks to see what was the nature of the transaction in this case, it is hopeless to contend that the parties only intended this as something in terrorem. Both parties recognised the fact of the importance of time; it is a case in which time is of the essence of the contract and so regarded by both parties, and the particular sum fixed upon as being the agreed amount of damages was suggested by the defendants themselves, and to say that that can be unconscionable or something which the parties ought not to insist upon, that it was a mere holding out something in terrorem, after looking at the correspondence between the parties is, to my mind, not a very plausible suggestion. I have, therefore, come to the conclusion that the judgments of the Courts in Scotland are perfectly right in this respect, and I think there is no ground for the contention that this is not pactional damage agreed to between the parties—and for very excellent reason agreed to between the parties—at the time the contract was entered into.

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My Lords, then there comes the further question as to waiver. That question, of course, assumes that these damages can be recovered, apart from the question of whether or not this vested right of action, which undoubtedly was a vested right of action, for the non-delivery of these boats within the limit of time can be answered by saying that it has been released by waiver. I am not certain that I understand the application of the doctrine of waiver to such a question as we are now dealing with of the release of a right of action already vested; but, assuming we get over that difficulty, I do not feel as a matter of fact that there is any evidence upon which anybody could reasonably rely that there was an agreement assented to by both parties that these damages should be waived. The earlier part of this transaction and the correspondence between the parties I think is quite satisfactorily dealt with by the Lord Ordinary in his very lucid judgment, and it comes to this: that because for some time—I think I may say in aid of the defendants' argument some considerable time—this was not put forward or insisted upon, that, of itself, is to be absolute evidence of a waiver. I do not see it. I must say I never heard of a waiver, the issue upon which is undoubtedly upon the party who averred it, established by such a proposition. The mere fact of payment without deduction I think may be dealt with very shortly. Assuming a great desire to get these vessels, and assuming that the Spanish Government were in earnest—and I do not know why it can be suggested that they were not—to get these vessels with great urgency, it would to my mind have been a very extraordinary thing if they should have risked the delay which would have arisen from a controversy in respect of claims which the builders undoubtedly had, and if they had given, as it were, an excuse for the non-delivery of the ships by reason of those claims giving rise to the sort of argument which has lasted not a short time here, and which would have come up to this House long after the war between the American and the Spanish Governments had come to an end. My Lords, under those circumstances it appears to me a very natural thing that the claim was not insisted upon in the first instance; and with

reference to the delay afterwards I cannot help having regard to the mode of Spanish administration; apart from any intention to waive, I can well imagine that for some time the question was allowed to hang over until the departments in London and in Madrid had ascertained their respective rights and the Spanish Government had made a claim. It is enough, however, to say that there is no evidence upon which any tribunal should reasonably act, even if there could be a waiver in point of law, as to which I venture to express considerable doubt; but, be that as it may, there is no evidence upon that, and I need not therefore express any opinion upon that subject.

I am entirely of opinion that the judgments of the Court below are right, and I move your Lordships that this appeal be dismissed with costs.

LORD DAVEY. My Lords, I am of the same opinion, and I can express the grounds upon which I have come to the same conclusion as my noble and learned friend on the Woolsack in a very few words.

As to the first question it is, as my noble and learned friend has pointed out, a question, not of words or of forms of speech, but of substance and of things, namely, whether a clause like the one in question provides for liquidate damages or for a penalty strictly so called in the sense of punishment irrespective of the damage sustained.

Now, my Lords, it appears to me that a very useful rule for guiding the Court in this matter has been laid down for us in this House by Lord Watson and Lord Herschell L.C. and the other noble and learned Lords who took part in the decision of the case of *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (1) In that case Lord Watson said this: "When a single slump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal, and subject to modification. The payments stipulated in art. 12

(1) 11 App. Cas. 332, 342, 345.

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are not of that character; they are made proportionate to the extent to which the respondent company may fail to implement their obligations, and they are to bear interest from the date of the failure. I can find neither principle nor authority for holding that payments so adjusted by the contracting parties with reference to the actual amount of damage ought to be regarded as penalties." Lord Herschell expressed himself in equally strong language when he said: "I know of no authority for holding that a payment agreed to be made under such conditions as these is to be regarded as a penalty only; and I see no sound reason or principle or even convenience for so holding."

My Lords, I therefore conceive that it may be taken as an established principle in the law of Scotland that, if you find a sum of money made payable for the breach, not of an agreement generally which might result in either a trifling or a serious breach, but a breach of one particular stipulation in an agreement, and when you find that the sum payable is proportioned to the amount if I may so call it, or the rate of the non-performance of the agreement—for instance, if you find that it is so much per acre for ground which has been spoilt by mining operations, or if you find, as in the present case, that it is so much per week during the whole time for which the non-delivery of vessels beyond the contract time is delayed—then you infer that primâ facie the parties intended the amount to be liquidate damages and not penalty. I say "primâ facie" because it is always open to the parties to shew that the amount named in the clause is so exorbitant and extravagant that it could not possibly have been regarded as damages for any possible breach which was in the contemplation of the parties, and that is a reason for holding it to be a penalty and not liquidate damages notwithstanding the considerations to which I have alluded.

My Lords, I confess I know of no other grounds—there may be grounds which may appear in future cases, but speaking from my present knowledge I am not aware of any other grounds—upon which a clause fixed under the conditions I have mentioned for breach of a particular stipulation in an

agreement can be held to be a penalty and not liquidate damages. But, my Lords, in *Forrest & Barr* v. *Henderson & Co.* (1) the Lord President (Lord Inglis) says this: "I hold it to be part of our law on this subject that, even where parties stipulate that a sum of this kind shall not be regarded as a penalty, but shall be taken as an estimate and ascertainment of the amount of damage to be sustained in a certain event, equity will interfere to prevent the claim being maintained to an exorbitant and unconscionable amount." My only criticism upon that sentence would be this—that I do not think that that is the right way of putting it. I think the fact of a claim being of an exorbitant or of an unconscionable amount as compared with any possible damages that could have been within the contemplation of the parties, is a reason for holding it not to be liquidate damages but a penalty. But that is only a difference of expression, and with the substance of the observation I entirely agree. But the Lord President adds this significant sentence: "But, of course, the question whether it is exorbitant or unconscionable is to be considered with reference to the point of time at which the stipulation is made between the parties." That is to say, you are to consider whether it is extravagant, exorbitant, or unconscionable, whatever word you like to select, at the time when the stipulation is made—that is to say, in regard to any possible amount of damages or any kind of damage which may be conceived to have been within the contemplation of the parties when they made the contract.

My Lords, I hold it to be perfectly irrelevant and inadmissible for the purpose of shewing the clause to be extravagant, in the sense in which I use that word, to admit evidence, such as the learned counsel who has last addressed us has drawn our attention to, of the damages which were actually suffered by the Spanish Government. I agree that it was for the very purpose of excluding that kind of evidence that the parties determined to have the damages liquidate in this manner by naming a specific sum, and it appears to me that the learned counsel have been doing the very thing which the parties

(1) 8 M. 187, 193.

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intended to prevent by the way in which they have framed their contract.

My Lords, there is no evidence that this sum would be extravagant or unconscionable in the sense in which those words are used in the passage which I read from the Lord President's judgment in *Forrest & Barr* v. *Henderson & Co.* (1) I need not dwell upon that. I may, however, point out that the sum was suggested by the defenders themselves in their tender and was accepted by the Spanish Government, the other contracting party. I adopt, and it is unnecessary for me to repeat, the very lucid and clear terms in which that subject has been dealt with both by the Lord Ordinary and by the Inner House.

Now, my Lords, with regard to the other question, namely, as to the waiver of the right to this sum which the respondents have got judgment for, I can only say that no such waiver is proved to my satisfaction, nor indeed do I think there is more than the merest scintilla of evidence, if there be any at all, in favour of it.

What the appellants undertake to do is to prove the release of a vested right of action, and the way in which they attempt to do it is chiefly by drawing our attention to the fact that in March, 1898, when the instalments were due on, I think, three of the vessels, the vessels having been delivered in the meantime, the Spanish Government paid the instalments without reserving any right to the liquidate damages. Of course the onus on this part of the case is upon the appellants. It may be that it would have been more prudent—it may even be that it would have been fairer —of the Spanish Government in making the payment of the last instalments to have reserved their right to make this claim; but it was not necessary for them to do so. There is no inconsistency between paying the instalments of the purchase price and, after considering all the matters which were placed before them for their consideration by the pursuers, making up their minds whether they would make this further claim or not. Indeed, they were almost bound to pay these instalments at

(1) 8 M. 187, 193.

once, because although it is quite true that, changing their minds, the shipbuilders had given delivery of the vessels, still as a matter of honour the Spanish Government were bound, and certainly the delivery was given in expectation that the payment would be made at an early date. I doubt whether it is even evidence of any intention to release this right of action in regard to these claims. It may very well be that the appellants thought, or rather hoped, that the matter was settled and that they would hear no more about it, but that of course would not amount to a release or waiver by the other party. The payments made in March, 1898, were not a settlement, and they did not even purport to be a settlement of all claims, because at the same time that the payments were made there were other claims which had been made and had to be settled for extras and other incidental expenses of that kind, so that there was not and did not even purport to be a settlement in March, 1898. I see no grounds whatever for holding that there was any waiver of the claims which had been put forward in this action.

My Lords, I adopt the very full and lucid language in which this part of the case has been dealt with in the judgment of the Lord Ordinary, with whose observations I entirely agree.

LORD ROBERTSON. My Lords, I agree that these judgments ought to be affirmed.

This clause, sought to be enforced, is not a general penalty clause, but a specific agreement that sums of money, graduated according to time, shall be paid as penalties for delays in delivering these vessels. Now the Court can only refuse to enforce performance of this pecuniary obligation if it appears that the payments specified were—I am using the language of Lord Kyllachy—" merely stipulated in terrorem, and could not possibly have formed " " a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation."

Now, all such agreements, whether the thing be called penalty or be called liquidate damage, are in intention and effect what Professor Bell calls " instruments of restraint,"

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Lord Robertson.

and in that sense penal. But the clear presence of this element does not in the least degree invalidate the stipulation. The question remains, Had the respondents no interest to protect by that clause, or was that interest palpably incommensurate with the sums agreed on? It seems to me that to put this question, in the present instance, is to answer it. Unless injury to a State is as matter of law inexpressible in money, Spain was or might be deeply interested in the early delivery of these ships and deeply injured by delay.

To my thinking, Lord Moncreiff has, in two sentences, admirably stated the case: "The subject-matter of the contracts, and the purposes for which the torpedo-boat destroyers were required, make it extremely improbable that the Spanish Government ever intended or would have agreed that there should be inquiry into, and detailed proof of, damage resulting from delay in delivery. The loss sustained by a belligerent, or an intending belligerent, owing to a contractor's failure to furnish timeously warships or munitions of war, does not admit of precise proof or calculation; and it would be preposterous to expect that conflicting evidence of naval or military experts should be taken as to the probable effect on the suppression of the rebellion in Cuba or on the war with America of the defenders' delay in completing and delivering those torpedo-boat destroyers."

The appellants' counsel frankly maintained that the delay merely saved the Spanish Government so much expense, as vessels of war do not earn freight—an argument which would be equally applicable to the case of the vessels never being delivered at all, so that a total breach of the contract would be a positive good in itself. But, in truth, the only apparent difficulty in the present case arises from the magnitude and complexity of the interests involved and of the vicissitudes affecting them, and as the question is whether this stipulation of 500*l.* a week is unconscionable or exorbitant, these considerations can hardly be considered a formidable difficulty in the way of the respondents.

On the question of waiver I must say I think the appellants'

case completely fails; and this matter is very adequately dealt with by the Lord Ordinary.

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Ordered, that the appeal be dismissed with costs.

Lords' Journals, November 17, 1904.

Agents for appellants: *Ashurst, Morris, Crisp & Co., for M'Grigor, Donald & Co., Glasgow, and Forrester & Davidson, W.S., Edinburgh.*

Agent for respondents: *J. T. Davies, for Macandrew, Wright & Murray, W.S., Edinburgh.*

[HOUSE OF LORDS.]

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ROSSI . . . . . APPELLANT;

AND

LORD PROVOST, &c., OF EDINBURGH AND OTHERS . . . . . } RESPONDENTS.

By-law—Ultra Vires—Ice-cream Vendor's Licence—Lawful Day—Edinburgh Corporation Act, 1900 (63 & 64 *Vict. c. cxxxiii.*), *s.* 80, *as amended by Edinburgh Corporation Order Confirmation Act*, 1901, *s.* 57.

By s. 80 of the Edinburgh Corporation Act, 1900, as amended by Edinburgh Corporation Order Confirmation Act, 1901, any person selling ice-cream (except in a duly licensed hotel) without a licence from the magistrates "who are hereby empowered to grant the same" for the house, building, or premises where such ice-cream is kept for sale or sold shall be liable to a penalty: Provided that such licence shall run from the date of issue until May 15 next ensuing, and upon renewal from the date of expiry of the licence so renewed to May 15 succeeding such expiry, "unless the same shall be sooner forfeited, revoked, or suspended," and that "every person licensed . . . . to sell ice-cream, under the provisions of this Act who shall . . . . sell ice-cream, except during the hours of" 8 A.M. and 11 P.M. "on any lawful day, or at such extended hour at night as the magistrates may by special regulation in particular cases and for reasons assigned permit," shall be liable in a penalty. No form of licence was annexed to the statute.

The magistrates proposed to issue the following licence: "(1.) That

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the said licensee shall not keep open said premises, or sell or permit the sale of ice-cream therein, on Sunday or on any other day set apart for public worship by lawful authority. (2.) That the said licensee shall not keep open said premises or sell or permit the sale of ice-cream therein before 8 o'clock in the morning or after 11 o'clock at night. (3.) That the said magistrates, or any of them, may at any time suspend or revoke this licence" :—

Held, reversing the decision of the Second Division of the Court of Session, that the conditions of the licence were ultra vires.

APPEAL against interlocutors of the Second Division of the Court of Session, Scotland. (1)

The Edinburgh Corporation Act, 1900 (63 & 64 Vict. c. cxxxiii.), s. 80, as amended by the Edinburgh Corporation Order Confirmation Act, 1901 (1 Edw. 7, c. clxxxiv.), s. 57, enacted: "From and after the commencement of this Act every person who shall keep or suffer to be kept or used or use any house, building, room, or place for . . . . or shall sell ice-cream (except in any premises duly licensed as an hotel) without having obtained a licence from the magistrates who are hereby empowered to grant the same for the house, building, or premises where . . . . such ice-cream is kept for sale or sold, and also every person licensed under this Act who shall not, during the continuance of such licence, put and keep up the words . . . . 'Licensed for the sale of ice-cream' legibly printed in some conspicuous place on or near the door, and on the outside of the house or building specified in the licence, shall be liable to a penalty not exceeding ten pounds, and in the event of such house, building, room, or place being continued to be kept or used for such purpose after such conviction to a continuing penalty of ten pounds for every day during which the offence is committed or continued, together with the reasonable costs and charges of the conviction: Provided always that such licences shall run from the date of issue until the 15th day of May next ensuing, and upon renewal from the date of expiry of the licence so renewed to the 15th day of May succeeding such expiry, unless the same shall be sooner forfeited, revoked, or suspended. . . . Every person licensed to sell ice-cream under the provisions of this Act who shall sell

(1) (1903) 5 F. 480.

ice-cream, except during the hours between eight of the clock in the morning and eleven of the clock at night on any lawful day, or at such extended hour at night as the magistrates may, by special regulation, in particular cases, for reasons assigned, permit shall be liable to the penalties in this Act provided." In pursuance of this section the magistrates of Edinburgh, the respondents, drew up and had printed a form of licence in the following terms, to be issued to the ice-cream vendors licensed by them, namely (Condescendence IX.)—

"Licence for the Sale of Ice Cream.

"The magistrates of the city of Edinburgh, in virtue of the powers conferred upon them by the Edinburgh Municipal and Police Acts, 1879 to 1901, did, and hereby do, license ——— residing at ——— to keep the premises situated at ——— as a place where ice-cream may be kept for sale or sold, and that for the period from the ——— day of ——— nineteen hundred and ——— to the fifteenth day of May nineteen hundred and ——— (unless said licence shall be sooner forfeited, revoked, or suspended), and under the following conditions, viz. :—

"1. That the said licensee shall not keep open said premises or sell or permit the sale of ice-cream therein on Sunday, or on any other day set apart for public worship by lawful authority.

"2. That the said licensee shall not keep open said premises, or sell or permit the sale of ice-cream therein before eight o'clock in the morning or after eleven o'clock at night.

"3. That the said magistrates, or any of them, may at any time suspend or revoke this licence."

After the licence was printed and offered to the appellant Francisco Rossi (vendor of ice-cream in Edinburgh), he brought this action against the magistrates of Edinburgh and others for declarator that they were not entitled to issue, and that he was not bound to accept, a licence containing these conditions, in respect that the conditions were not authorized by the above-mentioned Acts.

The respondents averred no title to sue, and that they were entitled to issue the licence complained of.

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On November 7, 1902, the Lord Ordinary (Lord Kincairney) found for the respondents, and assoilzied them from the conclusions of the action; and on February 20, 1903 (1), the Second Division of the Court of Session adhered.

1904. Nov. 17, 18, 21. *J. Crabb Watt, K.C.*, and *T. B. Morison* (with them *J. Crabb Watt*), (the two first of the Scottish Bar), for the appellant. The by-law is excessive, and not warranted expressly or impliedly by anything in the statute. The statute enacts that the magistrates may grant or may forfeit licences, but the by-law gives power to one magistrate to forfeit the licence at any time. The assurance that the magistrates will not act arbitrarily is worthless. The statute restrains the selling of ice-creams before or after certain hours; but in the statute there is, as there is in the by-law, no restriction against the sale of other goods before or after these hours. The by-law or licence is, therefore, an undue restraint of trade.

[They commented on *Auld* v. *Moretti* (2); *Reg.* v. *Wood* (3); *Municipal Corporation of Toronto* v. *Virgo* (4); *Ashley* v. *Magistrates of Rothesay* (5); *Nicol* v. *M'Neill* (6); *Phillips* v. *Innes.* (7)]

Cripps, K.C., and *F. T. Cooper, K.C.* (with them *H. W. Beveridge*), (the second of the Scottish Bar), for the respondents. The magistrates acting within their discretion can close entirely after a certain hour a house or building where ice-creams are sold. The magistrates had a discretion to refuse a licence; instead of refusing it they attached a condition to the grant of the licence. They acted in the exercise of a discretion which is implied in the statute. An ice-cream vendor is only entitled to a licence upon such conditions. As to "lawful day," see "day," Bell's Dictionary. The licence is not ultra vires.

[They commented on *Ex parte Harrington* (8); *Reg.* v.

(1) 5 F. 480.
(2) (1902) 4 F. (J.C.) 101.
(3) (1855) 5 E. & B. 49.
(4) [1896] A. C. 88.
(5) (1873) 11 M. 708; (1874) 1 R. (H.L.) 14.
(6) (1887) 14 R. (J.C.) 47.
(7) (1837) 2 Sh. & M'L. 465; 6 Sco. R. R. 647.
(8) (1887) 4 Times L. R. 435.

County Council of West Riding of Yorkshire (1); *Ashley* v. *Magistrates of Rothesay* (2); *Bute* v. *More.* (3)]

J. Crabb Watt, K.C., in reply.

EARL OF HALSBURY L.C. My Lords, the question here may be reduced to a very short point, namely, whether the civic authorities have power to make these regulations which are complained of, because in substance they are regulations although they are contained in the form of a licence which they issue and which involves the power to make a regulation. Whether it is called a regulation or a by-law it is a legislative power which, in my view, the Legislature has not confided to them.

My Lords, it is idle to say that a great many of these things, as has been urged in the arguments which have been addressed to your Lordships, would be very desirable for the sake, it is said, of public order. I confess, for myself, I am wholly unable to understand what question of public order arises in the sale of ice-cream; but I pass that by, because I do not know what was the occasion of this legislation. We have had no opportunity of considering it; neither is there anything in the statute itself, nor has anything been put before us, to shew that which would have been undoubtedly a proper and legitimate source of information—what was the occasion and what was the evil aimed to be remedied by the legislation which the Legislature has adopted. It is enough for me to say that I know nothing about it. I do not know what the evil aimed at was. I can give, therefore, no general view of what is the intention and purpose of the statute. I can only look at the statute itself and construe it, and when I construe the statute I find there is in the statute itself a plain prohibition with respect to certain things. The magistrates, of course, are not only empowered but bound to give effect to legislation which has been passed; but when it is argued that because they are given the power to restrict, within certain hours, the sale of ice-creams therefore they have implied power to do all that

(1) [1896] 2 Q. B. 386. (2) 11 M. 708; 1 R. (H.L.) 14.
(3) (1870) 9 M. 180.

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might be desirable or expedient with reference to the times and circumstances under which ice-creams shall be sold, it seems to me the argument entirely fails. What is sought to be done, whether directly by by-laws, or indirectly by the language of the licence that is issued, is something that can only be done by the Legislature. It is a restraint of a common right which all His Majesty's subjects have—the right to open their shops and to sell what they please subject to legislative restriction—and, if there is no legislative restriction which is appropriate to the particular thing in dispute, it seems to me it would be a very serious inroad upon the liberty of the subject if it could be supposed that a mere single restriction which the Legislature has imposed could be enlarged and applied to things and circumstances other than that which the Legislature has contemplated.

The result is, as it appears to me, that this form of this licence is entirely irregular, and when it is said that any Court can construe it so as not to infringe the liberty of the subject, and that they would simply withdraw the licence under certain circumstances, I think in the first place that is an untenable proposition. You have no right to allow to stand that which on its face would involve an undue restriction of the liberty of the subject on the ground that any Court afterwards would construe it so that it should not do so, because it would be ultra vires on the face of it. I think that would be wrong in itself, but it would be much more wrong to allow the subject to be called upon to take such a question from Court to Court, and ultimately to your Lordships' House, because they would not interfere with the language which the civic authority had used which, upon the face of it, involved an infringement upon the liberty of the subject.

My Lords, I confess for my own part I have entertained no doubt from the commencement of this case that this was ultra vires on the part of the civic authority. The only doubt I have entertained has been whether this was an appropriate form of remedy. I am told now—indeed, one of the learned judges himself points out—that if the fact is, as was contended before him, that a form of licence involving, as I say, a prohibition of

this sort was ultra vires, this is an appropriate form of remedy. Under those circumstances I can have no difficulty at all in advising your Lordships to allow this appeal, and to condemn the respondents in costs.

LORD DAVEY. My Lords, I certainly am not disposed to entertain the objection to the competency of this appeal, because looking at the judgments of the experienced Lord Ordinary and the Inner House I do not see in any of the judgments delivered by those learned judges, who of course must be assumed to know their own procedure, any objection to the competency of the action. Indeed, Lord Moncreiff says: "If the pursuer had been able to shew that the magistrates had exceeded their powers in this licence, he no doubt would have succeeded." I turn, therefore, to the substance of the argument of the learned counsel.

My Lords, in the year 1900 the town council or the magistrates of Edinburgh thought fit to apply to the Legislature and the Legislature passed an Act for the regulation of billiard-rooms and the sale of ice-cream. I must assume that there were circumstances connected with the trade of selling ice-cream in the city of Edinburgh which justified the intervention of the Legislature and made it right to impose special provisions on the sale of ice-cream which are not applicable to the sale of similar commodities. But, my Lords, every restriction and every regulation such as I find in the Act of 1900, repeated in the provisional order of 1901, is of course pro tanto a restraint upon the ordinary right of every British subject. It is in fact a restraint of trade, and I am of opinion that although the section of the Act and the provisional order in which I find such provisions ought to be construed fairly and ought to be construed so as reasonably to effect the object which the Legislature must be presumed to have had in view, you ought not by implication to extend the restriction in restraint of that particular trade further than the Legislature has sanctioned, and still less ought you to give such a construction to clauses of that description as would impose a restraint, not only upon the exercise of the particular trade which is in question but

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also upon the exercise of other trades which are not in question.

My Lords, bearing that in mind, I confess I should have used the same words as the Lord Justice-Clerk used, though not in the same sense as that in which he used them. He says, "This is a very simple case"—and so far I agree with him; but I regret to say I cannot agree in the conclusion which he has come to; for I am of opinion that every one of the so-called conditions in the way of restricting the pursuer's trade goes beyond anything that is sanctioned by the Legislature in the Act or the provisional order. I need not read to your Lordships or refer at length to the section—it is the section of the Corporation Act of 1900 which is called clause 80, which re-enacts with some additions clauses 285–6 of the Edinburgh Police Act, 1879—but I will merely point out to your Lordships that it provides for a licence being granted for the premises in which ice-cream may be sold, and prohibits any unlicensed person from selling ice-cream except on premises so licensed. But the prohibition is merely to selling ice-creams upon those premises, and then the section imposes a penalty for that offence, and also for not writing or putting up upon his premises the words, "Licensed for the sale of ice-cream," and it provides that the licence shall run from the 15th day of May in one year to the 15th day of May following, "unless the same be sooner forfeited, revoked, or suspended." Then it prohibits the selling of ice-cream except during the hours between 8 o'clock in the morning and 11 o'clock at night "on any lawful day."

Now, my Lords, the first condition in the licence which I think is open to objection is that it not only prohibits the sale of ice-cream, but it also prohibits the licensee from keeping open his said premises for the sale of other goods. That I think is wholly unwarranted by the Act. There is nothing whatever there to prevent or prohibit the licensee's keeping open his premises during such hours as he may otherwise lawfully do so. The prohibition is against selling ice-cream, but there is no prohibition against keeping open his premises for other purposes. For example, I suppose it is quite possible

that the sale of ice-cream may be combined with other branches of trade, and the effect of this proviso is to extend the prohibition as regards the hours and days when ice-cream may be sold to the sale of other commodities which may be lawfully sold on other days and at other times.

My Lords, it is said that this is in the nature of a condition for giving effect to the provisions of the statute, but I am not prepared to say that you can do that. I am of opinion that you cannot under the guise of giving better effect to the provisions of a statute extend the statute to the prohibition or the restraint of trades which are not included in the statute. Although I quite feel the force of the argument used by Lord Trayner on this part of the case, the answer really is that which has been given by my noble and learned friend on the Woolsack—that it might have been a very reasonable provision for the Legislature to have prescribed and inserted in the statute, but the Legislature has not done so.

Then, my Lords, the words in the statute are "on any lawful day," which I agree are ambiguous. The town council have construed those words to mean on Sunday or any other day set apart for public worship by lawful authority. Now, my Lords, Sunday no doubt is properly included, but as regards the further words, "or on any other day set apart for public worship by lawful authority," I do not know what is meant by "lawful authority." If it means that the Government or any other authority acting under the powers of an Act of Parliament prohibits the sale of ice-cream upon a certain day the prohibition will have effect; but if it does not do so I do not, I confess, agree that because a day other than Sunday is fixed for public worship by some authority it extends the restriction to such a day. That consideration derives still more force when it is considered that the prohibition is not only against the selling of ice-cream, but against the licensee keeping open his premises for other purposes.

My Lords, the same observation applies to No. 2; and then we come to No. 3, which is: "That the magistrates, or any of them, may at any time suspend or revoke this licence." Now I confess that I have not heard from the learned counsel, and

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I took the liberty of pressing the learned counsel on this point, of any power in the magistrates either to revoke or to suspend this licence. It is said that the words which I have read, "unless the same be sooner forfeited, revoked, or suspended," give the power. My Lords, that construction of the Act of Parliament seems to me to be entirely contrary to principle. The utmost that you can say is that the words seem to assume that the corporation either have already, or may at some future time, acquire a power to forfeit, revoke, or suspend the licence. That it does not give the power seems to me plain from a consideration of the words, because the words are, as your Lordships will observe, "forfeited, revoked, or suspended." Now "forfeited" has a clear and definite meaning when you are speaking of licences of this description. It means that if the licensee does or omits certain acts his licence will be forfeited. That is the plain meaning of it. Well, my Lords, you will look in vain in this statute or in this provisional order for anything that defines the conditions upon which the licence is to become forfeited. It is plain, then, that this clause does not make any provision for the licensee forfeiting his licence, and it is equally plain to my mind that it does not contain any power either to revoke or suspend the licence. I therefore agree with the motion which has been made by your Lordship that the interlocutors be reversed.

LORD ROBERTSON. My Lords, I am of the same opinion.

My Lords, the first question is whether the proposed form of licence does or does not accurately state the restrictions imposed by the statute on dealers in ice-cream. It seems to me that it does not, and that it purports to impose on the dealers more restrictions than does the statute. I can find no warrant in the statute for forcing the dealer to close his premises at the hours during which he is forbidden to sell ice-cream, and I know of no principle upon which the magistrates can be held entitled to eke out what they may consider a weak prohibition by imposing an additional one. The licence would compel a man who had a general baking or confectionery business to shut shop at the specified hours, merely because one

(and it might be an unimportant) item of his business was ice-cream. If the Legislature should in the future come to estimate the importance of ice-cream higher than it seems to do at present, it may adopt the stringent measure proposed. But in the meantime the respondents must be content to keep pace with the Legislature.

I further think that the respondents, in the third condition, arrogate to the magistrates a power not conferred on them.

As regards lawful days, I think Sundays are not, in the sense of the Act, lawful days, on the principle stated in this House in the case of *Phillips* v. *Innes*. (1) As regards the other days described in the proposed licence, I do not feel called on to discuss dubious questions about public fasts which have little or no practical importance, and shall only remark that it is quite out of place for a licensing body to put into the licence their gloss on the statute on such points, whether it be more or less probably correct. On the present point the respondents, I have no doubt with the best intentions, have gone out of their way to court discussion.

The next question is as to the form of action. Now the substance of the matter is that the magistrates have publicly threatened to impose and enforce on a lawful trade restrictions which are illegal. This being so, it would be unfortunate if it were necessary that a lawful trade should be interrupted and harassed by actual prosecution. It seems to me that the action of declarator, which is peculiar to the Scotch system, exactly meets the case. It is quite a mistake to assume that this trader requires to postulate what he has not got, namely, a licence, in order to find himself a title to sue. His title is his trade, which the respondents avow that they intend to interfere with by refusing to give a trader a licence except upon terms more onerous than the law allows. In my opinion the appellant has a perfectly good title to have those restrictions declared illegal.

Ordered, that the interlocutors appealed from be reversed: And declared that the magistrates

(1) 2 Sh. & M'L. 465; 6 Sco. R. R. 647.

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are not empowered to grant licences to ice-cream vendors for premises in the city of Edinburgh for the keeping for sale, or sale, of ice-cream, subject to any conditions or restrictions other than those specified in s. 80 *of the Edinburgh Corporation Act,* 1900, *as amended by the Edinburgh Corporation Order Confirmation Act,* 1901, *or in accordance therewith: And that the licence set out in Condescendence IX. is not conform to the said statutes: That the cause be remitted to the Court of Session: And that the respondents do pay to the appellant the costs in the Court of Session and in respect of this appeal.*

Lords' Journals, November 21, 1904.

Agents for appellant: *Traill, Howell & Page, for Donaldson & Nisbet, SS.C., Edinburgh.*

Agents for respondents: *A. & W. Beveridge, for Thomas Hunter, W.S. (Town Clerk), Edinburgh.*

[PRIVY COUNCIL.]

CANADIAN PACIFIC RAILWAY COMPANY . . . . . } APPELLANTS;

AND

CORPORATION OF THE CITY OF TORONTO . . . . . } RESPONDENTS.

J. C.* 1904 *Aug.* 2; *Nov.* 11.

ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF ONTARIO.

Lease of Land—Covenant to pay Taxes—Usual Covenant by Lessee.

Where an agreement between the appellant railway and the respondent corporation provided for a renewable lease from the latter to the former of a large tract of land for railway purposes, but was silent as to payment of taxes by the appellant:—

Held, that the lease should contain a covenant by the appellant to pay the same, partly because the effect of the Assessment Act in force at the date of the contract was to impose such liability on the lessees of municipal lands without recourse to the corporation, and partly because a covenant to that effect was shewn to be a usual covenant in the sense that the corporation invariably insisted on it in their leases.

APPEAL from a judgment of the Court of Appeal (April 14, 1903) affirming with a variation a judgment of the Chancellor (May 19, 1902).

The main question at issue was whether a covenant for the payment of taxes should be inserted in a lease from the city to the company, which lease is sufficiently narrated in the judgment of their Lordships.

The company were petitioners under the Vendor and Purchaser Act (Revised Statutes of Ontario, 1887, c. 112, s. 3). An order of reference was made, and the referee decided that the lease should contain a covenant to that effect. The two Courts upheld his decision.

Blake, K.C., *MacMurchy, K.C.*, and *Hodge*, for the appellants, contended that the covenant so inserted should be

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

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expunged. The evidence shewed that during the negotiations for the lease the appellants refused to incur that liability, and that the covenant was accordingly omitted. There being at the least no agreement expressed to pay taxes, it was impossible to imply or presume it. It was not a usual covenant in the sense of being incidental to the lease necessary to perfect the agreement between the parties. As to the nature of the tax, the municipal tax on land in Ontario is like land tax, property tax, sewer rate, and tithe rent-charge in England. The Act in force at the date of the contract in this case was the Ontario Consolidated Assessment Act, 1892 (55 Vict. c. 48). According to its provisions the tax is imposed on the fee, and this ought not to be charged against the lessee for a term of years. It is a landlord's tax, and cannot be thrown on the tenant in the absence of express agreement to that effect. According to the actual agreement, the company completely discharged its obligations by paying rent. Reference was made to *In re Canadian Pacific Ry. Co.* (1); *Watson* v. *Home* (2); *Yaw* v. *Leman* (3); *Smith* v. *Humble.* (4)

C. Robinson, K.C., Fullerton, K.C., and *Rowlatt*, for the respondent, were not heard upon this point.

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The judgment of their Lordships was delivered by

LORD DAVEY. This is an appeal from an unanimous judgment of the Court of Appeal of Ontario confirming, except in one particular, a previous judgment of Boyd C. The principal question between the parties is, whether a lease from the corporation of the city of Toronto to the Canadian Pacific Railway Company ought to contain a covenant by the latter for the payment of taxes. There are two other questions, namely, at what date the payment of rent should commence, and whether interest is payable on arrears of rent, and, if so, from what date.

The lease in question is made in execution of an agreement dated July 26, 1892, and a supplementary agreement dated February 4, 1895. These agreements were entered into under the authority of an Act of the legislature of Ontario, and were

(1) (1900) 27 O. A. R. 54.
(2) (1827) 7 B. & C. 285; 31 R. R. 200.
(3) (1743) 1 Wils. 21.
(4) (1854) 15 C. B. 321.

confirmed by the Dominion legislature. Read together, they provide for a lease by the corporation to the railway company of a large tract of land for the purposes of their railway for a term of fifty years, commencing on January 1, 1895, and renewable for ever at a rent to be increased on each renewal. There is nothing said as to the payment of taxes by the railway company. On the one hand, therefore, the agreements do not in express terms impose on the railway company any liability which it would not otherwise be subject to, but, on the other hand, there is nothing to exempt them from any existing liability. It should be observed that the railway company were in possession of the land from some date in the year 1893, and also that the corporation did not complete their title to the land until May 28, 1898.

The question whether the lease should contain a covenant for the payment of taxes was treated in the first instance as depending on the application of what was called the doctrine of usual covenants in an open agreement. And a vast amount of evidence was taken on the question whether this was an usual covenant. It may be doubted whether any such general consideration is applicable to an agreement of so special a character as the one in question. Their Lordships, however, think with the learned judges in the Chancery Court and the Court of Appeal that the question involved depends mainly on other considerations, and is, in truth, comparatively simple and free from difficulty. The first and obvious step in the inquiry is to ascertain on whom the burdens fall by law as between these two parties, and the answer to this question is free from any serious doubt.

The Assessment Act in force at the date of the contract was that of 1892 (55 Vict. c. 48). By s. 7 of that Act all property in the province is liable to taxation, subject to certain exemptions, of which the seventh is in these words:—

"The property belonging to any county or local municipality, whether occupied for the purposes thereof or unoccupied, but not when occupied by any person as tenant or lessee, or otherwise than as a servant or officer of the corporation for the purposes thereof."

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By s. 20 the taxes may be recovered from either the owner, tenant, or occupier saving his recourse against any other person; and by s. 24 it is provided that any occupant may deduct from his rent any taxes paid by him if the same could also have been recovered from the owner or previous occupant, unless there is a special agreement between the occupant and the owner to the contrary. Their Lordships have no doubt that the effect of these sections is to impose the liability for taxes on the lessees of lands belonging to a municipality, without any recourse to the municipal corporation. It appears from the cases referred to in the judgment of the learned Chancellor that the same view of these enactments has been taken by the Courts of the province. The appellants do not, in fact, contend that the liability for payment of the taxes ought to be imposed by the lease on the corporation, but they wish the matter to be left at large with a view to future litigation. Their Lordships do not think this would be right, and they think that the corporation are entitled to the covenant as a reasonable protection against the property, which is the security for their rent, being taken in execution for non-payment of taxes. The corporation have a duty towards those for whose benefit they hold their land, and they would be guilty of something like negligence if they did not insist on the insertion of the covenant in question in their leases. The evidence, however, shews, as might be expected, that they invariably do so, and therefore the covenant is an usual one if the only relevant class of cases be looked at.

It cannot be and is not now disputed that the rent is payable from January 1, 1895, the railway company having been in possession long before that date. But their Lordships do not agree wholly either with the Chancellor or the Court of Appeal as to the interest on the rent in arrear. The interest is payable only by way of damages for the delay in payment, and their Lordships think that the appellants should not be considered in default until May 28, 1898, when the corporation first shewed a good title to grant the lease.

Their Lordships will, therefore, humbly advise His Majesty that the order of the Court of Appeal of April 14, 1903, ought

to be varied by a direction that interest be allowed only on the arrears of rent due to the respondents on May 28, 1898, as from that date, and on subsequent arrears from the several dates when they accrued due, and that quoad ultra the said order ought to be affirmed. Their Lordships will not disturb the orders for costs in the Court below, and as to the costs of this appeal will adopt the same course as that taken by the learned Chancellor, and order the appellants to pay to the respondents four-fifths of their costs of this appeal.

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Solicitors for appellants: *Blake & Redden.*
Solicitors for respondents: *Freshfields.*

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR THE PROVINCE OF PRINCE EDWARD ISLAND . . . . . } APPELLANT;

AND

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . } RESPONDENT.

ATTORNEY-GENERAL FOR THE PROVINCE OF NEW BRUNSWICK. } APPELLANT;

AND

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . } RESPONDENT.

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ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, s. 51, *sub-s.* 4; *ss.* 3 *and* 146—*Readjustment of Representation—Construction—"Aggregate Population of Canada."*

Sect. 51 of the British North America Act, 1867, directs after each decennial census a readjustment of the representation in the Dominion House of Commons of the four provinces constituted by that Act. It provides as the rule of readjustment that Quebec shall have the fixed number of sixty-five representatives, and that each of the other provinces

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

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shall have that number which bears the same proportion to its population as sixty-five bears to that of Quebec. But its sub-s. 4 prohibits a reduction of the number of the representatives in the case of any province unless the proportion which the number of its population bore to the number of the aggregate population of Canada at the last preceding readjustment is ascertained at the then latest census to have been diminished by one-twentieth part or upwards.

Held, on a case submitted to the Supreme Court of Canada as to whether New Brunswick was protected from reduction of its members, that on the true construction of sub-s. 4 the expression "aggregate population of Canada" relates to the whole of Canada as constituted by the Act, and therefore includes, not merely the four provinces constituted by proclamation issued under s. 3, but also all the provinces subsequently incorporated and admitted into the Union by Order in Council under s. 146:

Held, also, with regard to the province of Prince Edward Island, which had under s. 146 been admitted into the Union by Order in Council directing that it should have six members, its representation to be readjusted from time to time under the provisions of the Act of 1867, that sub-s. 4 on its true construction did not protect that number from reduction until an increase thereof had been previously effected.

THE first of these appeals was from a judgment of the Supreme Court (June 8, 1903) upon a case submitted by Order in Council under the Supreme and Exchequer Courts Act (Revised Statutes of Canada, c. 135), as amended by Act 54 & 55 Vict. c. 25, which raised the following question:—

"Although the population of Prince Edward Island as ascertained at the census of 1901, if divided by the unit of representation ascertained by dividing the number of sixty-five into the population of Quebec is not sufficient to give six members in the House of Commons of Canada to that province, is the representation of Prince Edward Island in the House of Commons of Canada liable, under the British North America Act, 1867, and amendments thereto and the terms of Union of 1873 under which that province entered Confederation, to be reduced below six, the number granted to that province by the said terms of Union of 1873?"

The Supreme Court of Canada answered in the affirmative, deciding that the representation of the province is liable to be reduced according to each decennial census if the unit of representation under the British North America Act is large enough to produce that result.

After that judgment was delivered an Act was passed by the Parliament of Canada (3 Edw. 7, c. 60) under which, upon the dissolution of the then existing Parliament, four members only were to be elected to the House of Commons for the province of Prince Edward Island. In 1892 Act 55 & 56 Vict. c. 11 had reduced the number to five.

Taschereau C.J. held that it was provisionally that the island was given six members till its representation was readjusted with that of the other provinces as provided for by s. 51. The 12th resolution of the Order in Council (set out in their Lordships' judgment on p. 47) must be construed as meaning that the representation of the province shall be readjusted after every decennial census, its representation in the meantime to be composed of six members. He concluded: "I am of opinion that as by the federal census of 1901 the population of Prince Edward Island divided by the unit of representation ascertained by dividing the number of sixty-five into the population of Quebec is not sufficient to give six members in the House of Commons to that province, the representation of that province must be readjusted and reduced proportionately to population as provided for by s. 51."

The second appeal was from a judgment of the Supreme Court (April 29, 1903) on the following question referred to it by the Governor in Council:—

"In determining the number of representatives in the House of Commons, to which Nova Scotia and New Brunswick are respectively entitled after each decennial census, should the words 'aggregate population of Canada' in sub-s. 4 of s. 51 of the British North America Act, 1867, be construed as meaning the population of the four original provinces of Canada, or as meaning the whole population of Canada, including that of provinces which had been admitted to the Confederation subsequent to the passage of the British North America Act?"

The Supreme Court's answer was that the words "aggregate population of Canada" in sub-s. 4 of s. 51 of the British North America Act, 1867, should be construed as meaning the whole population of Canada, including that of provinces which have

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been admitted to the Confederation subsequent to the passage of the British North America Act.

Aylesworth, K.C., and *Peters, K.C.*, for Prince Edward Island, contended that the answer to the question should have been in the negative. Under the terms of the British North America Act and of the resolutions under which the island entered the Union, it was intended that the province should retain six members; that the number should never be less. If the result of any decennial census should be that the province was entitled, according to its population, to more than six members, and the number thereof accordingly be increased, then any additional representation so given beyond the original six would always afterwards be subject to reduction, if the result of any subsequent census should make it necessary. In aid of this contention they referred to various circumstances surrounding and preceding the terms of union, and particularly to correspondence between the negotiating governments, their minutes and journals. It was within the power of the Dominion Government to make special terms and agreements with any province on its admission, provided such terms were ratified by Order in Council and confirmed by legislative enactment. The island was admitted on July 1, 1873, and its position depends on the terms then made and on the British North America Act, ss. 37, 51, and 52. They contended that a minimum representation of six was one of those terms—not as a matter of right, or as a matter of giving representation by population, but because of the peculiar position of the island. It was not intended to be temporary and liable to diminution at the next census. With regard to Act 55 & 56 Vict. c. 11, which reduced the representation to five, that alone could not affect an Imperial statute which had given six as a minimum. With regard to the British North America Act, 1867, the only changes in representation contemplated are of increase from the original numbers, with diminutions (if subsequently necessary) from such increase: see s. 52. It was contended that s. 51 applied only to the four provinces mentioned in s. 37, the section which fixed the total number of members, and the number for

each of the four provinces. It was s. 146 which provided for additional provinces being admitted to the Union, on terms to be fixed in each case separately. In the case of the island it was agreed that it should always have at least six members—two for each of its three counties. The stipulation for readjustment under the provisions of the Act of 1867 implies only readjustment by way of increase, subject to subsequent restriction, but never below the minimum of six. There is no provision in the Act of 1867 which contemplates reduction below the number originally fixed. Sub-s. 4 of s. 51 is merely negative, protecting from reduction except where there has been a previous increase. Under the British North America Act, 1871 (Imperial), c. 28, the Dominion Parliament, with the consent of a province, may enlarge its limits. 61 Vict. c. 3 has enlarged the limits of Quebec, and the increased population so obtained will lead to a decennial increase of the limit of representation, with corresponding diminution in the representation of the island, whose boundaries do not admit of expansion. This could not have been the intention, and in interpreting an instrument of federal union the Court should apply principles of construction more liberal and broad than are applicable to private contracts so as to get at the true intention. The union in this case was under s. 146 subject to the provisions of the Act. That means that its terms must not be inconsistent with the general and specific provisions thereof, under which a number of members is assigned to the whole House and to each province, which may be increased, but which must not be diminished.

Pugsley, K.C., and *R. J. Parker*, for New Brunswick, contended that upon the true construction of s. 51 it relates only to the proportionate representation of the original four provinces of the Dominion, and not to the representation of any province subsequently admitted thereto. Sect. 146 is the only section which authorizes a subsequent admission. Thereunder the representation of an admitted province is left to be determined by the several legislative Acts or orders under which such admission is effected. By Imperial proclamation (May 22, 1867) the Dominion of Canada came into existence

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under the Act of 1867, composed of the four provinces. In 1870 the North-West Territory and Rupert's Land were admitted to the Union on terms which did not provide for the representation of either in the Dominion Parliament. The province of Manitoba was also admitted in that year on terms which assigned to it a number of members out of all proportion to the number of its population, calculated on the basis provided by the Act of 1867 for the four original provinces, which led to the British North America Act, 1871 (34 & 35 Vict. c. 28), being passed by the Imperial Parliament. In that year, 1871, British Columbia was admitted with three members in the Senate and six in the House of Commons, the representation to be increased under the provisions of the Act of 1867. In 1873 Prince Edward Island was admitted. The Dominion at the present time includes other territories, whose representation is provided for by the British North America Act, 1886, which does not provide in their case for any readjustment according to s. 51 of the Act of 1867. They contended that under these circumstances it was not competent for the Canadian Parliament to reduce the number of members for New Brunswick from fifteen to thirteen as provided by the redistribution proposed after the decennial census of 1901. The words "aggregate population of Canada" in sub-s. 4 of s. 51 meant the aggregate population of the four original provinces constituted by the Act of 1867, and not the aggregate population increased by that of subsequently admitted provinces and territories. Calculated upon that basis, the population of New Brunswick had not proportionately decreased to the extent provided for by that sub-section. Consequently the condition precedent to reduction had not been fulfilled. The proportionate representation of the four provinces is fixed by s. 51. It cannot be and it never was intended that it should be altered by subsequent arrangements between the Dominion and candidates for admission thereto, to which the four provinces in question are not parties, and over which they have no control.

Blake, K.C., Lemieux, K.C., Newcombe, K.C., and *F. Russell*, for the Dominion, were not heard.

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1904. Nov. 4. The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. These appeals have been brought against two decisions of the Supreme Court of Canada upon two questions referred to that Court for its opinion by Order in Council under the Canadian Act, 54 & 55 Vict. c. 25. The two questions have arisen out of the same occurrences, though different considerations apply to them, and the two appeals were argued together. They may conveniently be disposed of in one judgment.

The British North America Act, 1867, s. 3, empowered Her late Majesty in Council to declare by proclamation that, on and after a day therein appointed, not being more than six months after the passing of the Act, the provinces of Canada, Nova Scotia, and New Brunswick should form and be one Dominion under the name of Canada; and on and after that day those three provinces were to form and be one Dominion under that name accordingly.

Sect. 1 said: "The subsequent provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on and after the Union, that is to say, on and after the day appointed for the Union taking effect in the Queen's Proclamation; and in the same provisions, unless it is otherwise expressed or implied, the name Canada shall be taken to mean Canada as constituted under this Act."

Sect. 5 said: "Canada shall be divided into four provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick."

Sect. 8 said: "In the general census of the population of Canada which is hereby required to be taken in the year one thousand eight hundred and seventy-one, and in every tenth year thereafter, the respective populations of the four provinces shall be distinguished."

Sect. 37 said: "The House of Commons shall, subject to the provisions of this Act, consist of one hundred and eighty-one members, of whom eighty-two shall be elected for Ontario, sixty-five for Quebec, nineteen for Nova Scotia, and fifteen for New Brunswick."

Sect. 51 is as follows: "On the completion of the census in

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the year one thousand eight hundred and seventy-one, and of each subsequent decennial census, the representation of the four provinces shall be readjusted by such authority, in such manner, and from such time as the Parliament of Canada from time to time provides, subject and according to the following rules:—

"(1.) Quebec shall have the fixed number of sixty-five members.

"(2.) There shall be assigned to each of the other provinces such a number of members as will bear the same proportion to the number of its population (ascertained at such census) as the number sixty-five bears to the number of the population of Quebec (so ascertained).

"(3.) In the computation of the number of members for a province a fractional part not exceeding one-half of the whole number requisite for entitling the province to a member shall be disregarded; but a fractional part exceeding one-half of that number shall be equivalent to the whole number.

"(4.) On any such readjustment the number of members for a province shall not be reduced unless the proportion which the number of the population of the province bore to the number of the aggregate population of Canada at the then last preceding readjustment of the number of members for the province is ascertained at the then latest census to be diminished by one twentieth part or upwards.

"(5.) Such readjustment shall not take effect until the termination of the then existing Parliament."

By s. 52 the number of members of the House of Commons may be from time to time increased by the Parliament of Canada, provided the proportionate representation of the provinces prescribed by the Act is not thereby disturbed.

Sect. 146 is as follows: "It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on addresses from the Houses of the Parliament of Canada, and from the Houses of the respective legislatures of the Colonies or provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or provinces, or any of them, into the Union, and on address from

the Houses of the Parliament of Canada to admit Rupert's Land and the North-Western Territory, or either of them, into the Union, on such terms and conditions in each case as are in the addresses expressed, and as the Queen thinks fit to approve, subject to the provisions of this Act; and the provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland."

Canada in the widest sense of the term now comprises, in addition to the four original provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, three other provinces which have entered the Dominion at various dates subsequent to its first formation — Manitoba, British Columbia, and Prince Edward Island. It also comprises certain territories which have not received the organisation of provinces.

It will be convenient here to notice briefly certain of the circumstances connected with the admission of each of the new provinces into the Dominion, for some argument was based upon them. Manitoba was the first of the new provinces, and it was carved out of Rupert's Land and the North-Western Territory referred to in s. 146 of the British North America Act, 1867. An Order in Council, based upon an address as contemplated by that section, was issued on June 24, 1870, by which Rupert's Land and the North-Western Territory were made part of the Dominion of Canada. In preparation for this Order in Council, at a time when it was expected but had not actually issued, the Canadian Act, 33 Vict. c. 3, was passed. It enacted that from the time when the expected Order in Council should incorporate Rupert's Land and the North-Western Territory there should be carved out of them the province of Manitoba.

It was added by s. 2 that: "On, from and after the said day on which the Order of the Queen in Council shall take effect as aforesaid, the provisions of the British North America Act, 1867, shall, except those parts thereof which are in terms made, or by reasonable intendment may be held to be, specially applicable to, or only to affect, one or more, but not the whole of the provinces now composing the Dominion, and except so

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far as the same may be varied by this Act, be applicable to the province of Manitoba, in the same way, and to the like extent as they apply to the several provinces of Canada, and as if the province of Manitoba had been one of the provinces originally united by the said Act"; and by s. 4 that: "The said province shall be represented, in the first instance, in the House of Commons of Canada, by four members, and for that purpose shall be divided by proclamation of the Governor-General into four electoral districts, each of which shall be represented by one member: Provided that on the completion of the census in the year 1881, and of each decennial census afterwards, the representation of the said province shall be readjusted according to the provisions of the fifty-first section of the British North America Act, 1867."

This Canadian Act was affirmed and full validity given to it by the Imperial British North America Act, 1871 (34 & 35 Vict. c. 28).

British Columbia was admitted into the Dominion by an Order in Council bearing date May 16, 1871, which was based upon addresses as contemplated by s. 146 of the Act of 1867 and embodied their terms. It is only necessary to refer to the following:—

Sect. 8: "British Columbia shall be entitled to be represented in the Senate by three members, and by six members in the House of Commons. The representation to be increased under the provisions of the British North America Act, 1867."

Sect. 10: "The provisions of the British North America Act, 1867, shall (except those parts thereof which are in terms made, or by reasonable intendment may be held to be, specially applicable to, and only affect, one and not the whole of the provinces now comprising the Dominion, and except so far as the same may be varied by this minute) be applicable to British Columbia in the same way and to the like extent as they apply to the other provinces of the Dominion, and as if the Colony of British Columbia had been one of the provinces originally united by the said Act."

Prince Edward Island was made part of the Dominion of Canada by Order in Council dated June 26, 1873, which like

its predecessor was based upon, and embodied the terms of, the addresses contemplated by the statute. It is only necessary to notice one clause (12):—

"That the population of Prince Edward Island having been increased by fifteen thousand or upwards since the year 1861, the island shall be represented in the House of Commons of Canada by six members; the representation to be readjusted from time to time under the provisions of the British North America Act, 1867."

With regard to the territories not included in provinces it is sufficient to say that the Imperial British North America Act, 1886 (49 & 50 Vict. c. 35), gave full power to the Canadian Legislature to provide for the parliamentary representation of territories, and Acts of the Canadian Legislature have from time to time conferred upon the inhabitants of the territories rights of representation in the Dominion Parliament, on a more liberal scale, it was stated, than would result from a strict application of the usual rule of proportion.

In 1871, and in each tenth year from that time, a census of the Dominion has been taken in accordance with s. 8 of the British North America Act, 1867. And each such census has been followed by an Act of the Dominion Parliament to readjust the representation of the provinces, in conformity with the results disclosed by the census, according to the principles embodied in s. 51.

Such a census was taken in 1901, and in 1903 followed the Act readjusting representation. That Act as passed reduced the number of representatives in the House of Commons of certain of the provinces of the Dominion, of which it is only necessary to mention New Brunswick, whose members were reduced in number from 14 to 13, and Prince Edward Island whose members fell from 5 to 4.

Each of these provinces objected to the principles upon which the readjustment had been carried out, and with respect to each of these provinces a question was submitted by Order of the Governor-General in Council for the opinion of the Supreme Court.

New Brunswick was one of the four original provinces of

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the Dominion, and in her case there could be no doubt of the applicability of s. 51 of the Act of 1867; the only doubt suggested was as to its construction. The question submitted was this:—

"In determining the number of representatives in the House of Commons to which .... New Brunswick .... is entitled after each decennial census, should the words 'aggregate population of Canada' in sub-s. 4 of s. 51 of the British North America Act, 1867, be construed as meaning the population of the four original provinces of Canada, or as meaning the whole population of Canada including that of provinces which have been admitted to the Confederation subsequent to the passage of the British North America Act?"

Prince Edward Island was not one of the four original provinces, but was incorporated in the Dominion in 1873 on terms which have been sufficiently noticed. On her behalf considerations were raised of a somewhat different character from those in the case of New Brunswick. The question submitted to the Supreme Court in the case of Prince Edward Island was this:—

"Although the population of Prince Edward Island, as ascertained at the census of 1901, if divided by the unit of representation ascertained by dividing the number of 65 into the population of Quebec is not sufficient to give six members in the House of Commons of Canada to that province, is the representation of Prince Edward Island in the House of Commons of Canada liable under the British North America Act, 1867, and amendments thereto, and the terms of Union of 1873 under which that province entered Confederation, to be reduced below six, the number granted to that province by the said terms of Union of 1873?"

The case relating to New Brunswick was the first to come before the Supreme Court, and in that case the learned judges answered the question laid before them to the effect that "the words 'aggregate population of Canada' in sub-s. 4 of s. 51 of the British North America Act, 1867, should be construed as meaning the whole population of Canada, including that of the provinces which have been admitted to the Confederation

subsequent to the passage of the British North America Act." And they gave full reasons for their conclusion.

The case of Prince Edward Island afterwards came before the Court, and in that case the learned judges after argument, and for reasons fully stated by them, answered the question submitted to them in the affirmative.

The appeals now before their Lordships are against these two decisions. The appeal of Prince Edward Island was filed first, and the learned counsel for that province was the first to be heard before their Lordships. But it will be more convenient to deal with the cases in the order in which they came before the Supreme Court, and to consider that of New Brunswick first.

The scheme of s. 51 is clear and simple. In directing a readjustment of representation after each decennial census, it provides that Quebec is to have a fixed number of sixty-five representatives, and that each of the other provinces is to have assigned to it a number of representatives bearing the same proportion to its population as sixty-five bears to that of Quebec. This is the enactment by virtue of which the number of representatives of any province can be increased or diminished, and this is the enactment which furnishes the rule for such a change. Nor is there any dispute that upon the principle so laid down taken by itself the reduction in the number of representatives of New Brunswick was right.

The question arises upon sub-s. 4, a sub-section which introduces a restriction or qualification upon what has gone before, by saying that on any readjustment the number of members for a province shall not be reduced unless the proportion which the number of the population of the province bore to the number of the aggregate population of Canada at the last preceding readjustment is ascertained to be diminished by one-twentieth part or upwards. And the point is as to the meaning of the words "the aggregate population of Canada." By s. 4 Canada is defined as meaning "unless it is otherwise expressed or implied . . . . Canada as constituted under this Act." Under the scheme of the Act the Dominion was not constituted by the immediate operation of the Act itself. The

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territory included in the four original provinces was incorporated by proclamation issued under the authority of s. 3. The territory included in the provinces subsequently incorporated was admitted by Orders in Council issued under s. 146. In their Lordships' opinion all these provinces equally form part of Canada as constituted under the Act.

The contentions raised on behalf of New Brunswick were these: First, it was said that in sub-s. 4 of s. 51 Canada means only the four original provinces. This contention seems to their Lordships inconsistent with s. 4. It was next said that Canada, in sub-s. 4 of s. 51, could at most only apply to such provinces as were in the fullest sense themselves governed by that section, and that by reason of the terms of incorporation already cited, this was not the case with regard to each of the three provinces admitted since the original formation of the Dominion. Whatever be the case with regard to the latter part of this contention, it seems clear that the provinces in question form part of Canada as constituted under the Act.

Lastly, it was contended that the territories should be excluded in estimating the aggregate population of Canada under sub-s. 4. It is doubtful, however, whether this point properly arises on the question submitted to the Supreme Court. It was not suggested that the exclusion of the territories from the calculation could have affected the result of the readjustment, and the Supreme Court has rightly not dealt with this matter.

For these reasons their Lordships agree with the learned judges of the Supreme Court in the case of New Brunswick.

The case put forward on behalf of Prince Edward Island was somewhat wider in its scope. It was suggested that s. 51 applies only to the distribution of representatives between the four original provinces. But the terms on which Prince Edward Island was incorporated expressly declared that its representation was "to be readjusted from time to time under the provisions of the British North America Act, 1867."

It was further argued that, supposing s. 51 to apply to Prince Edward Island, still it was not liable to have the number of its representatives reduced in 1903 for the following

reasons: that by the terms of sub-s. 4 there could be no reduction on any decennial adjustment unless there was a previous readjustment to afford a comparison, so that for any province the first readjustment could not entail a reduction though it might permit of an increase, that there was no readjustment for any province unless its representation was altered, and that therefore, by the combined operation of s. 51 and of the terms on which Prince Edward Island entered the Confederation, its representation could not be reduced unless it had been previously increased.

This argument assumes that there has been no readjustment for any province unless there has been alteration. Their Lordships think this is to give too narrow a meaning to the word. In their opinion, when as the result of a census the representation of the provinces is reconsidered and the necessary changes, if any, made to bring it into harmony with the results of the census, that is a readjustment within the meaning of sub-s. 4, whether there be or be not any change in the case of any particular province. Their Lordships, therefore, think that the answer of the Supreme Court to the question submitted to it was correct.

Their Lordships will humbly advise His Majesty that each of these appeals should be dismissed.

There will be no order as to costs.

Solicitors for Prince Edward Island: *Blake & Redden.*

Solicitors for New Brunswick: *Field, Emery, Roscoe & Medley.*

Solicitors for the Dominion: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.* 1904 *July* 21, 22; *Nov.* 11.

CORPORATION OF THE CITY OF TORONTO . . . . . } PLAINTIFFS;

AND

BELL TELEPHONE COMPANY OF CANADA . . . . . } DEFENDANTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

British North America Act, 1867, *ss.* 91, 92, *sub-s.* 10 (*a*)—*Dominion Act* (43 *Vict. c.* 67)—*Ontario Act* (45 *Vict. c.* 71)—*Powers of Dominion Legislature—Local Undertakings extended beyond Provincial Limits.*

Held, that under its Dominion incorporating Act (43 Vict. c. 67) the respondent telephone company was entitled, without the consent of the municipal corporation, to enter upon the streets and highways of the city of Toronto and to construct conduits or lay cables thereunder, or to erect poles with wires affixed thereto upon or along such streets or highways. The scope of the respondents' business contemplated by the said Act and involving its extension beyond the limits of any one province was within the express exception made by s. 92, sub-s. 10 (*a*), of the British North America Act, 1867, from the class of local works and undertakings assigned thereby to provincial legislatures. Accordingly, Act 43 Vict. c. 67 was within the exclusive competence of the Dominion Parliament under s. 91.

Ontario Act 45 Vict. c. 71, passed to authorize the exercise of the above powers within the province, subject to the consent of the corporation, was held to be ultra vires, and could not by reason of having been passed on the application of the respondent company be validated as a legislative bargain.

APPEAL from a judgment of the Court of Appeal (Sept. 14, 1903) reversing a judgment of Street J. (Feb. 26, 1902) on a special case stated in two actions.

The respondents claimed in two actions, one brought by themselves and the other by the appellants, the right under their incorporating Acts, which were passed by the Dominion

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

legislature, to enter upon the streets and highways of the appellants which vested in them under their Municipal Act of the province of Ontario, and to construct conduits or cables thereunder, or to erect poles and affix wires thereto upon or along such streets or highways without the appellants' consent.

When the respondents began business, the question as to their right to carry on a local business was raised in the province of Quebec (*Reg.* v. *Mohr* (1)), and decided adversely to them, whereupon, at their instance, on March 10, 1882, the statute 45 Vict. c. 71, intituled "An Act to confer certain powers upon the Bell Telephone Company of Canada," was enacted by the legislature of Ontario. This Act recites, among other things, "that doubts have arisen as to the powers of the said company under the said Act" (43 Vict. c. 67) "in regard to those portions of its work and undertaking which are local and do not extend beyond the limits of this province," and by s. 2 enacts: "The Bell Telephone Company of Canada may construct erect and maintain its line or lines of telephone along the sides of and across or under any public highways streets bridges watercourses or other such places: Provided the said Company shall not interfere with the public right of travelling on and using such highways streets bridges or watercourses and provided that in cities towns and incorporated villages the Company shall not erect any pole higher than forty feet above the surface of the street nor affix any wire less than twenty-two feet above the surface of the street nor carry any such poles or wires along any street without the consent of the municipal council having jurisdiction over the streets of the said city, town or incorporated village."

On May 17, 1882, the respondents' Dominion incorporating Act (43 Vict. c. 67) was amended by the Dominion statute 45 Vict. c. 95, by inserting the words "the location of the line or lines and" in the 28th line of s. 3 thereof after the word "villages," and by the 4th section of the said amending Act it is provided that "the said Act of incorporation as hereby amended and the works thereunder authorized are hereby declared to be for the general advantage of Canada."

(1) (1881) 7 Q. L. R. 183; 2 Cartwright, 257.

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A special case was agreed upon in the said two actions on which the judgment of the Court should proceed.

Street J. decided in favour of the appellants, and is reported in (1902) 3 Ont. L. R. 470. He held that while the Dominion Act (43 Vict. c. 67) duly incorporated the company, it did not thereby obtain the power of interfering in any province with the property or rights of persons until so authorized by the provincial legislature.

The Court of Appeal, Maclennan J.A. dissenting, whose judgments are reported in (1903) 6 Ont. L. R. 335, held that the incorporating Act and the amending Act are within clause 10 (*a*) of s. 92 of the British North America Act, and within the exclusive legislative authority of the Parliament of Canada; and that the powers conferred by the Act as amended are not curtailed by the provisions of the Ontario Act as regards the right to construct and maintain telephone lines along the sides of and across or under any highway or street of the city for the purposes of either their local or long-distance business, subject, however, to the provisions in s. 3 of the incorporating Act as amended.

C. Robinson, K.C., and *Fullerton, K.C.*, for the appellants, contended that the incorporating Acts were not within the exclusive legislative authority of the Dominion Parliament. The principal Act (43 Vict. c. 67) did not declare the works of the company to be for the general advantage of Canada, or for the advantage of two or more of the provinces as provided in sub-s. 10 (*c*) of s. 92 of the British North America Act, 1867. The works would, therefore, come within the exclusive powers assigned to the provinces by s. 92, except in so far as they might be "works or undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the provinces," within sub-s. 10 (*a*) of s. 92. The amending Act (45 Vict. c. 95) declared those works to be for the general advantage of Canada; but it was contended that that applied only to the long-distance business and lines, and in any case did not abrogate the Ontario Act (45 Vict. c. 71), under which the respondents require the assent of the appel-

lants to enable them to carry their lines of telephone (at least for local business) under or along the city streets. They further contended that the respondents, having applied for and obtained the Ontario Act, are subject to its restrictions, if not by force of the enactment, as the result of the legislative agreement evidenced thereby to which the respondents were parties. The respondents' works or undertakings do not come within the exclusive powers of the Dominion Parliament unless and until they actually connect provinces or extend beyond provinces, and then only as to works or undertakings so actually connecting or extending. The Act of 1867 does not exempt from the jurisdiction of the provincial legislatures works which are merely authorized so to connect or extend, but only such works as actually have that practical result. Reference was made to *McArthur* v. *Northern and Pacific Junction Ry. Co.* (1); *Re Grand Junction Ry. Co.* (2); *Reg.* v. *Mohr* (3); *Canadian Pacific Ry. Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (4); *Madden* v. *Nelson and Fort Sheppard Railway* (5); *Dow* v. *Black* (6); *Bonn* v. *Bell Telephone Co.* (7); *Bell Telephone Co.* v. *Belleville Electric Light Co.* (8)

Blake, K.C., and *Cassels, K.C.*, for the respondents, contended that under the British North America Act the respondent company has been from the time of its incorporation within the exclusive legislative jurisdiction of the Dominion. Its objects and powers must be ascertained by reference to the incorporating Act. A telephone company's operations necessarily comprise, not merely long-distance telephone lines extending beyond the limits of a province, but also shorter lines between various urban centres, so as to enable its customers to communicate at whatever distance, great or small. The powers given by the Act were no more than were absolutely necessary to enable the company's business to be carried on. The objects and powers of the company involved action and operation beyond the boundaries of a single province: see s. 92,

(1) (1890) 17 O. A. R. 86.
(2) (1880) 45 U. C. Q. B. 302.
(3) 7 Q. L. R. 183; 2 Cartwright, 257.
(4) [1899] A. C. 367.
(5) [1899] A. C. 626.
(6) (1875) L. R. 6 P. C. 272.
(7) (1899) 30 Ont. Rep. 696, 702.
(8) (1886) 12 Ont. Rep. 571.

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sub-s. 10 (*a*). Consequently the Act was within the exclusive powers of the Dominion, irrespective of whether those powers were exercised, or objects attained. The Ontario Act was ultra vires and inoperative. As for a legislative bargain, it was merely passed to allay doubts which the company did not share as to that part of its business which was local within the province. It was a precautionary measure, not an adjustment of conflicting rights. The company's rights are such as are given to them by their incorporating Acts, and cannot be impaired by the Ontario legislature.

Robinson, K.C., replied.

1904 Nov. 11.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from a judgment of the Court of Appeal for Ontario on a special case stated by agreement in two separate actions, in each of which the appellants, the corporation of the city of Toronto, claimed an injunction against the Bell Telephone Company of Canada.

The claim was founded upon the contention that the Telephone Company was not entitled to enter upon the streets and highways of the city and to construct conduits or lay cables thereunder, or to erect poles with wires affixed thereto upon or along such streets or highways without the consent of the corporation.

The company had been incorporated by a Dominion statute of April 29, 1880 (43 Vict. c. 67), for the purpose of carrying on the business of a telephone company. The scope of its business was not confined within the limits of any one province. It was authorized to acquire any lines for the transmission of telephone messages "in Canada or elsewhere," and to construct and maintain its lines along, across, or under any public highways, streets, bridges, watercourses, or other such places, or across or under any navigable waters, "either wholly in Canada or dividing Canada from any other country," subject to certain conditions and restrictions mentioned in the Act, which are not material for the present purpose.

The British North America Act, 1867, in the distribution

of legislative powers between the Dominion Parliament and provincial legislatures, expressly excepts from the class of "local works and undertakings" assigned to provincial legislatures "lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces or extending beyond the limits of the province": sect. 92, sub-s. 10 (*a*). Sect. 91 confers on the Parliament of Canada exclusive legislative authority over all classes of subjects so expressly excepted. It can hardly be disputed that a telephone company the objects of which as defined by its Act of incorporation contemplate extension beyond the limits of one province is just as much within the express exception as a telegraph company with like powers of extension. It would seem to follow that the Bell Telephone Company acquired from the legislature of Canada all that was necessary to enable it to carry on its business in every province of the Dominion, and that no provincial legislature was or is competent to interfere with its operations, as authorized by the Parliament of Canada. It appears, however, that shortly after the incorporation of the company doubts arose as to its right to carry on local business. The question was raised in the province of Quebec, and decided adversely to the company in the case of *Reg.* v. *Mohr*. (1) In consequence of this decision, with which their Lordships are unable to agree, the company applied for and obtained from the legislature of Ontario an Act of March 10, 1882 (45 Vict. c. 71, Ontario), authorizing it to exercise within that province the powers which the Dominion Act had purported to confer upon it. This Act, however, according to the construction placed upon it by the corporation (which, for the present purpose, their Lordships assume to be correct), makes the consent of the municipal council a condition precedent to the exercise of the company's powers in cities, towns, and incorporated villages.

The company was proceeding to construct its lines in the city of Toronto without having obtained the consent of the corporation, when the corporation brought the two actions

(1) 7 Q. L. R. 183; 2 Cartwright, 257.

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which resulted in the special case the subject of the present appeal.

The case was heard in the first instance by Street J., who decided in favour of the corporation; but his decision was reversed by the Court of Appeal for Ontario, Maclennan J.A. dissenting.

The view of Street J. apparently was that, inasmuch as the Act of incorporation did not expressly require a connection between the different provinces, the exclusive jurisdiction of the Parliament of Canada over the undertaking did not arise on the passing of the Act, and would not arise unless and until such a connection was actually made. In the meantime, in his opinion, the connection was a mere paper one, and nothing could be done under the Dominion Act without the authority of the legislature of the province. This view, however, did not find favour with any of the learned Judges of Appeal. In the words of Moss C.J.O., "the question of the legislative jurisdiction must be judged of by the terms of the enactment, and not by what may or may not be thereafter done under it. The failure or neglect to put into effect all the powers given by the legislative authority affords no ground for questioning the original jurisdiction." If authority be wanted in support of this proposition, it will be found in the case of *Colonial Building and Investment Association* v. *Attorney-General of Quebec* (1), to which the learned Judges of Appeal refer.

Maclennan, J.A. differed from the rest of the Court on one point only. He agreed in thinking that it would not be competent for a provincial legislature of itself to limit or interfere with powers conferred by the Parliament of Canada, but he seems to have thought that the Bell Telephone Company by reason of its application to the Ontario legislature was precluded or estopped from disputing the competency of that legislature, and that the enactment making the consent of the corporation a condition precedent amounted to a legislative bargain between the company and the corporation to the effect that the company would not use the powers conferred upon it by the Dominion Parliament without the consent of the

(1) (1883) 9 App. Cas. 157, at p. 165.

corporation. Their Lordships, however, cannot accept this view. They agree with the Chief Justice in thinking that no trace is to be found of any such bargain, and that nothing has occurred to prevent the company from insisting on the powers which the Dominion Act purports to confer upon it.

Their Lordships, therefore, are of opinion that the appeal must fail.

There are two minor points which ought perhaps to be noticed.

(1.) It was argued that the company was formed to carry on, and was carrying on, two separate and distinct businesses—a local business and a long-distance business. And it was contended that the local business and the undertaking of the company so far as it dealt with local business fell within the jurisdiction of the provincial legislature. But there, again, the facts do not support the contention of the appellants. The undertaking authorized by the Act of 1880 was one single undertaking, though for certain purposes its business may be regarded as falling under different branches or heads. The undertaking of the Bell Telephone Company was no more a collection of separate and distinct businesses than the undertaking of a telegraph company which has a long-distance line combined with local business, or the undertaking of a railway company which may have a large suburban traffic and miles of railway communicating with distant places. The special case contains a description of the company's business which seems to be a complete answer to the ingenious suggestion put forward on behalf of the appellants.

"The company," it says, "carries on a long-distance telephone business and a local telephone business in various places in the Dominion, including the city of Toronto, operated by means of lines of telephone as hereinafter defined. The local business consists of furnishing communication between persons using telephones in a city, town, or other place where a central exchange exists. There are central exchanges to which run both the local and long-distance lines. Any person in Toronto may use the long-distance lines for the purpose of speaking to a person outside of Toronto by going to a central exchange and

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paying the usual charge therefor, and any telephone subscriber in Toronto desiring to speak to a person outside of Toronto may use the long-distance lines for the purpose of having connection made with them through the central exchange and paying such usual charge. In doing this he would use his own instrument and line to the central exchange and the long-distance line from there. The long-distance lines are not used in the local business.

"A line or lines of telephone consist of poles with wires affixed thereto, or of conduits with wires carried through the same."

(2.) An Act of May 17, 1882 (45 Vict. c. 95), amending the Company's Act of incorporation, and passed by the Dominion legislature immediately after the passing of the Ontario Act, was referred to in the course of the argument. This Act seems to have been intended, partly at any rate, to neutralize the effect of the Ontario Act. It declares the Act of incorporation as thereby amended and the works thereunder authorized "to be for the general advantage of Canada." It is not very easy to see what the part of the section declaring the Act of incorporation to be for the general advantage of Canada means. As regards the works therein referred to, if they had been "wholly situate within the province," the effect would have been to give exclusive jurisdiction over them to the Parliament of Canada; but, inasmuch as the works and undertaking of the company authorized by the Act of incorporation were not confined within the limits of the province, this part of the declaration seems to be unmeaning. Then the Act of incorporation was amended by the introduction of words giving the engineer or other officer appointed by the municipal council a voice in "the location of the line" as well as in "the opening up of the street." It was contended that this amendment enabled the council to select the course of the line and to determine the streets through which it might be taken. Their Lordships, however, do not think the words introduced by the amendment can have the effect of enabling the council to refuse the company access to streets through which it may propose to carry its line or lines. They may give the council a voice in

determining the position of the poles in streets selected by the company, and possibly in determining whether the line in any particular street is to be carried overhead or underground.

In the result, their Lordships will humbly advise His Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal.

Solicitors for appellants: *Freshfields.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

ROBERTS . . . . . PLAINTIFF;

AND

EREAUT . . . . . DEFENDANT.

J. C.*
1904
Nov. 11;
Dec. 19.

ON APPEAL FROM THE ROYAL COURT OF JERSEY.

Law of Jersey—Jurisdiction of Royal Court—Parish Vote for application of Parish Funds—Suit to annul a Resolution of the Parish Assembly—Laches of Plaintiff.

The civil assembly of a parish in Jersey having on September 3, 1903, voted a specific sum of money for the repairs of the church as recommended by the ecclesiastical assembly, a contract was duly made on September 17 for their execution:—

Held, that an action by the appellant brought on September 20 to declare the resolution of the 3rd illegal and void was too late, inasmuch as he did not take action till after the parish authorities had entered into their contract, though he was a member of both assemblies and knew that repairs were urgent, and that by a series of proceedings from February to September the impugned liability was in contemplation.

APPEAL from a judgment of the Superior Number of the Royal Court (Oct. 22, 1903) affirming a judgment of the Inferior Number of the same Court (Sept. 26, 1903) dismissing an action which was brought by the appellant against the Connétable of the parish of St. Saviour's, Jersey, to restrain the application of funds raised by its parish assembly by means of a parish rate to the repair and restoration of the parish

* *Present:* LORD MACNAGHTEN, LORD LINDLEY, and SIR ARTHUR WILSON.

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church in accordance with resolutions of the ecclesiastical assembly of the same parish, and the raising of the required sum in the meantime by means of a loan.

Both the Courts below held that the appellant was debarred from bringing the action by reason of his acquiescence, laches, and delay, and that as regards the question of the loan the action was premature.

Fraser and *Nicolle*, for the appellant, contended that an important question of principle was raised by the action, whether the repairs of the church in question could be legally paid for out of the parochial rate; and that a plea of laches ought not to have been sustained. A previous action by two "principals" to annul the resolution of September 3 having failed, the appellant brought the present action on the first Court day thereafter, which was only eight days after the previous plaintiffs had been nonsuited. The parish authorities had displayed undue haste in making their contract. Their proceeding should not be allowed to impose on the appellant a prohibitive limit of time.

C. E. Jenkins, K.C., and *J. G. Wood*, for the respondent, contended that the appellant was too late. He was qualified and entitled to be present at all meetings from the first on February 4 to that of September 3, and was duly summoned. He did not lodge any formal written complaint or protest against any one of the resolutions which led up to that of September 3, nor did he take any steps until after the contract was made.

1904 *Dec.* 19.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This is an appeal from a judgment of the Superior Number of the Royal Court of Jersey dated October 22, 1903, affirming a judgment of the Inferior Number of the same Court. There is no serious doubt as to the facts, nor is there any dispute as to the principles of law which must govern the decision. The controversy is as to application of admitted law to the particular facts of the case.

The plaintiff is one of the principaux of the parish of St.

Saviour, in the island of Jersey, and as such he is a member of both the assemblies by which the affairs of the parish are controlled, the ecclesiastical assembly and the civil assembly.

On February 4, 1903, a meeting of the ecclesiastical assembly of St. Saviour's was held to consider the report of an architect as to the condition of the parish church, and certain specifications, plans, and estimates for the purpose of putting the church in a perfect state of repair.

On February 10, 1903, the matter came before the civil assembly, and the resolution then arrived at by that body is thus recorded: "The assembly having taken cognizance of the Act of the ecclesiastical assembly, dated February 4, 1903, according to the terms of which Mr. Curry, civil engineer and architect, is charged to prepare plans, specifications, and estimates of the various works which would be required to put the whole of the church in a good state of repair, has authorized the Connétable to pay the preliminary costs which will have to be incurred by reason of the said decision." It was stated and not disputed that the plaintiff, appellant, was not present at either of these meetings.

A fuller report from the architect was then obtained, dated August 12, 1903, in which he recommended repairs estimated to cost 2000*l.* And on August 25 that report came before the ecclesiastical assembly for consideration. The ecclesiastical assembly at that meeting adopted the architect's report, and decided to execute the works recommended; and "owing to the insufficiency of the Trésor funds the assembly decided to ask the civil assembly to vote the necessary amount for the execution of the said repairs."

The matter came before the civil assembly on September 3. That assembly voted the sum of 2000*l.* for the works recommended by the ecclesiastical assembly according to the report of the architect, and resolved to issue a loan, and charged the parochial committee to carry out the Act of the assembly. It was not disputed that the appellant was present at this meeting and opposed the resolution.

Two other members of the assembly, Messrs. Pritchard and Richardson, who had also opposed the resolution of September 3,

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1903, instituted an action in the Royal Court on September 5 in which they sought to annul the decisions of the meeting. The case was heard by the Inferior Number of the Court, and on September 12, 1903, the action was dismissed on the ground that the then plaintiffs were precluded from maintaining it by the course they had taken with reference to the February resolution of the civil assembly.

On September 16 the parochial committee met to carry out the resolution of the 3rd of that month, and accepted a tender for the execution of the repairs. On the following day, the 17th, a contract with the contractors was executed.

On September 19, the first Court day after the 12th, the now appellant filed the present suit against the Connétable of the parish, in which he asked that the vote of 2000*l.* for the repairs of the parish church and the resolution to issue a loan of September 3 might be declared to be illegal and void, and that the defendant be ordered to expunge them from the Acts.

At the hearing, which took place on September 26 before the Inferior Number of the Royal Court, the defendant submitted a preliminary plea to the effect that, under the circumstances of the case, the plaintiff had neglected to prosecute his objections in proper time.

On this point the Court held that, "inasmuch as the petitioner took no steps before the Act of the assembly which he contests had been partly put into execution by the acceptance of the tender of a contractor, and by the commencement of the works ordered by virtue of this Act and of previous parochial Acts referring to the same subject, the Court ruled that the petitioner is too late in complaining." The decision of the Court as to the resolution for a loan is not material for the purposes of the present appeal. The Superior Number of the Royal Court affirmed this decision on appeal, and against that decision the present appeal has been brought.

It was not disputed in argument that the Royal Court has jurisdiction to interfere if the civil assembly of the parish passes a vote which would apply the funds under its control to purposes not warranted by law, when the Court is put in motion by the proper person and under proper circumstances.

It was not disputed, on the other hand, that one who seeks to invoke the assistance of the Court for such a purpose must appeal to the Court with due promptitude. What their Lordships are asked to say upon this appeal is that the Royal Court was wrong in holding that the plaintiff, appellant, had failed to comply with this condition.

It was pointed out in argument that the resolution against which the attack is actually directed was passed on September 3, and that the present suit was instituted on the 19th of the same month, a short interval in any case. And it was contended that allowance should be made in the appellant's favour for the period during which the suit of Messrs. Pritchard and Richardson was pending.

On the other hand, there are very serious matters to be considered. It is true that the resolution formerly attacked was of September 3, but the series of proceedings began in February and form a continuous sequence, all based upon the view that the civil assembly was to hold itself responsible for the necessary repairs of the church, and all directed, step by step, to carry that view into effect. It is not alleged that the appellant was not throughout aware of those proceedings. It seems clear that the necessity for repairs was urgent and called for immediate action. The appellant appears to have deliberately delayed taking action until after the result of the earlier suit of Messrs. Pritchard and Richardson was known, though there does not seem to have been any arrangement that that suit was to be regarded as a test action. And, in fact, the appellant did not take action until after the parish authorities had acted upon the impugned resolution by entering into a contract for the execution of the repairs.

Their Lordships see no reason to dissent from the conclusion arrived at by the Royal Court. They will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the costs.

Solicitors for appellant: *Slack, Monro & Atkinson.*
Solicitors for respondent: *Bennett & Ferris.*

[PRIVY COUNCIL.]

J. C.* 1904 Dec. 1, 19.

COMMONWEALTH PORTLAND CEMENT COMPANY, LIMITED . . . } PLAINTIFFS;

AND

WEBER, LOHMANN & CO., LIMITED DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Principal and Agent—Construction of Contract—Obligation of Agent to pass Goods through the Custom House—Action for not expediting Clearance so as to avoid a newly imposed Duty.

Where the respondents contracted for certain fixed charges to lighter and load on railway trucks the machinery of the appellants brought by ship, and also to pass it through the Customs without extra charge:—

Held, that this obligation did not involve the duty of expediting the clearance of the appellants' goods in less than the twenty-four hours allowed by the Customs Regulation Act, 1879, so as to avoid the payment of duty, which came into force before the expiration of that time. The appellants, who sued to recover the amount of the duty so paid, had not requested that the clearing should be expedited, though the circumstances were not within the contemplation of the contract, and were rightly nonsuited.

APPEAL from an order of the Supreme Court (Aug. 27, 1903) refusing to set aside a judgment of nonsuit.

The action was brought to recover damages for breach of a contract to lighter, handle, and load, and to pass certain machinery and building materials through the Customs House in Sydney within a reasonable time after the arrival of such shipments, or alternatively with care and diligence after their arrival there, and for, as the plaintiffs alleged, the negligent and unskilful conduct of the defendants, and their delay in making such entries, by reason whereof the plaintiffs, as they stated, had to pay certain Customs duties, namely, 997*l.* 5*s.* 10*d.*, on the importation.

The report of the trial is given in 3 N. S. W. State Rep. 516.

Owen J. nonsuited the plaintiffs under the circumstances

* *Present:* LORD MACNAGHTEN, LORD LINDLEY, SIR FORD NORTH, and SIR ARTHUR WILSON.

stated in the judgment of their Lordships because there had been no breach of the contract between the parties, which he held to be not to pass the goods at some special time, but only in accordance with the requirements of law, i.e., within two days after the report of the vessel, pursuant to the regulations made under the Customs Act, 1901, s. 72, which had been brought into force after the arrival of the ship.

In the Court of Appeal the Chief Justice was of opinion that the defendants, being only employed ad hoc to pass entries, were not under any obligation (such as general agents would be subject to) from time to time as circumstances might arise to exercise their discretion in guarding the defendants' interests from injury, and were not liable for negligence in not passing the entries at a time when it was probable that duties would shortly be imposed. He, however, was of opinion that, if there was any such obligation, the damages claimed were not too remote. Simpson J. considered that the duties arising out of the defendants' contract varied according to the circumstances of the case, and that they were under obligation towards the plaintiffs to act as reasonably and carefully as they would in their own affairs, but that the damages were too remote. Walker J. held that, though the duties and responsibilities of an agent must be determined according to the circumstances and exigencies arising from time to time, yet that is subject to this qualification—that the liability of the agent is to be limited to the class of risks contemplated by the parties when the agency commenced.

Cohen, K.C., and *Tyrrell Paine*, for the appellants, contended that on the true construction of the contract between the parties the respondents undertook, not merely to enter the plaintiffs' goods, but to exercise reasonable diligence in and about entering them. The question whether the respondents had exercised reasonable diligence depended, not merely on the circumstances existing at the time when they undertook the agency, but upon all the circumstances which existed at any time during the agency, and which were known, or which might and ought to have been known, to them. There was

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1904
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evidence which ought to have been submitted to the jury that such reasonable diligence had not been exercised by the respondents. Reference was made to *Dudgeon* v. *Pembroke* (1); *Giblin* v. *McMullen* (2); *Emu Gravel and Road Metal Co.* v. *Gibson*. (3)

C. C. Scott (*Lawson Walton, K.C.*, with him), for the respondents, contended that their obligation, apart from any special arrangement to pass the goods within a special time, was to pass them according to the practice as between the parties, or in the time provided by the Acts and regulations made thereunder. They had no notification from the appellants or the authorities that the goods would be subjected to a new tariff—it was not in contemplation at the time of the contract, and their duties could not be enlarged by rumours or conjectures. The damages complained of arose from special circumstances which had no relation to the contract. Notice by the appellants of the occasion of urgency and a request that special measures should be taken were conditions precedent to such an action as this. Reference was made to *Horne* v. *Midland Ry. Co.* (4), which was affirmed in the Exchequer Court; *Hadley* v. *Baxendale* (5), *Elbinger Actien-Gesellschafft* v. *Armstrong* (6), *Grébert-Borgnis* v. *Nugent* (7), Mayne on Damages, 1903 ed. p. 42, and to the local case cited on the other side.

Cohen, K.C., replied.

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Dec. 19.

The judgment of their Lordships was delivered by

LORD LINDLEY. This is an appeal from a judgment of the Supreme Court of New South Wales affirming a judgment of nonsuit in an action brought by the appellants against the respondents.

The appellants are manufacturers of cement. Their head office and works are at Portland, New South Wales. They

(1) (1874) L. R. 9 Q. B. 581, 592; S.C. (1877) 2 App. Cas. 284, 295.
(2) (1868) L. R. 2 P. C. 318, 337.
(3) (1903) 3 N. S. W. State Rep. 204.
(4) (1872) L. R. 7 C. P. 583; and see 8 C. P. 131.
(5) (1854) 9 Ex. 341.
(6) (1874) L. R. 9 Q. B. 473.
(7) (1885) L. R. 15 Q. B. 85.

had ordered machinery from abroad, and it was to arrive at Sydney in a steamer named the *Karlsruhe* consigned to the care of the respondents, who were shipping agents there. The ship arrived on Sunday, October 6, 1901. Monday was a holiday. The ship was reported early on Tuesday, October 8. When the ship arrived no Customs duty was payable in New South Wales on machinery imported from abroad; but, like other duty-free goods, it had to be entered and cleared at the Customs House at Sydney, and (as will be more fully explained presently) the respondents had undertaken to pass it through the Customs House for the appellants.

By the New South Wales Customs Regulation Act, 1879 (42 Vict. No. 19), twenty-four hours from the date of the report of the ship were allowed for entering and clearing duty-free goods, Sundays and holidays not being counted.

Before twenty-four hours for entering and clearing the machinery had expired and before it had been cleared, namely, in the afternoon of October 8, the machinery became liable to a heavy duty of 900*l.* odd, and it could not be afterwards cleared or landed until this duty was paid.

It was proved at the trial that there was ample time to enter and clear the machinery on October 8 before the duty became chargeable. It was also proved that on the morning of October 8 the defendants did enter and clear some goods of their own brought by the *Karlsruhe*. It was further proved that it had been for some time common knowledge in Sydney that the Government of New South Wales was contemplating the publication of an Ordinance bringing into operation in New South Wales the Customs Act, 1901, passed on October 3 by the Commonwealth Parliament of Australia. Such an Ordinance was in fact published in the afternoon of October 8.

These being the admitted facts, the question arises whether the appellants, who had to pay the duty to get their goods landed, are entitled to recover the amount from the respondents as damages for their negligence. This question really turns on the duty of the respondents; and this depends on their contract with the appellants. The contract is to be found in a series of letters passing between the two companies,

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commencing on April 24 and ending on October 3, 1901. The short effect of these letters was that the respondents undertook to lighter and load on railway trucks the machinery of the appellants brought by the *Karlsruhe* for certain fixed charges, and they also agreed to pass the machinery through the Customs without extra charge. It is clear from the correspondence that the payment of Customs duties was not contemplated by either party. To enter and clear duty-free goods involved no difficulty or trouble worth mentioning to the respondents, who were to receive and lighter them; and it was very natural that the respondents should further undertake to pass them through the Customs House without extra charge.

The appellants contend that the obligation contracted by the respondents included the duty to exercise reasonable diligence in entering and clearing the goods, and that this involved the duty to protect the appellants' goods from loss, which was known to the respondents to be imminent or at least probable. The appellants further contend that it should have been left to the jury to say whether such diligence was exercised or not.

The respondents, on the other hand, contend that all they agreed to do was to enter and clear the goods in the usual way in the time fixed by the Customs regulations. They contend that the appellants are seeking to throw upon them a duty which they never undertook and which was never contemplated by either party.

There is no doubt that all agents are bound to take reasonable care in doing what they have undertaken to do; but it appears to their Lordships that the appellants cannot succeed unless they can shew that it was the duty of the respondents to attend to taxation by the Government and to take reasonable care to protect the appellants' goods from taxation. Their Lordships are of opinion that the contract between the parties did not impose upon the respondents any legal obligation to pay attention to what the Government might or might not do as regards altering Customs duties, and that there was no evidence to go to the jury of any breach by the respondents of any duty which they owed to their employers.

This was the view taken by the judge who tried the case and

by the Supreme Court. In coming to the same conclusion, their Lordships have assumed that all the questions put, and successfully objected to, had been answered favourably to the appellants. No wilful misconduct was imputed to the respondents. The appellants knew quite as well as the respondents that the imposition of Customs duties was to be feared, and they knew that the goods were arriving; but the appellants did not request the respondents to expedite the clearing under the peculiar circumstances which had arisen, and which had never been contemplated by either party.

Under these circumstances their Lordships are of opinion that the nonsuit was correct, and that there was no misdirection or improper rejection of evidence. The case was one in which a jury would be very likely to go wrong by reason of the fact that the respondents cleared their own goods early on October 8, and that the respondents might have cleared the appellants' goods at the same time. But what they might have done and what they legally were bound to do are two very different questions.

Their Lordships will humbly advise His Majesty to dismiss this appeal, and the appellants must pay the costs.

Solicitors for appellants: *Paines, Blyth & Huxtable.*
Solicitors for respondents: *Snow, Fox & Higginson.*

[PRIVY COUNCIL.]

J. C.* 1904 *July* 13; *Nov.* 11.

McARTHUR . . . . . PLAINTIFF;

AND

DOMINION CARTRIDGE COMPANY . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Damage caused by Explosion—Verdict—Absence of exact Proof of Cause of Injury—Order setting Verdict aside reversed.

A jury having found that an explosion occurred through the neglect of the defendant company to supply suitable machinery and to take proper precautions, and that the resulting injury to the plaintiff was not in any way due to his negligence, the verdict was upheld by the unanimous judgment of two Courts :—

Held, that an order by the Supreme Court setting aside the verdict on the ground that there was no exact proof of the fault which certainly caused the injury must be reversed. Proof to that effect may be reasonably required in particular cases; it is not so where the accident is the work of a moment, and its origin and course incapable of being detected.

APPEAL in formâ pauperis by special leave from a judgment of the Supreme Court (Taschereau J. dissenting) which reversed judgments of the Court of King's Bench, appeal side, for the province of Quebec and the Court of Review for the district of Montreal, and setting aside a verdict for the appellant for $5000, as damages for an injury sustained whilst in the employment of the respondents, and caused by the explosion of an automatic loading machine in their factory.

The majority of the judges, whose judgment was delivered by Gerouard J., considered this case to be similar to *Asbestos and Asbestic Co.* v. *Durand* (1) in one respect, that the accident was caused by an explosion. "But as to the cause of this explosion," they said, "it is very different. Here we are left entirely in the dark. No negligence or fault whatever is established and no presumption is possible. The Courts below

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

(1) (1900) 30 S. C. R. 285.

do not even attempt to indicate any. All the witnesses declare they cannot account for the accident. Alone the plaintiff attributes it to a jam of the cartridges in the automatic machine. But that was a mere supposition. He is not even certain that his back was not turned to the machine at the time of the explosion. (It is proved that the machine was perfect and worked regularly and properly.) The trial judge so found and certified under the provisions of the new Code of Civil Procedure, and there is ample evidence in support of his finding. The Court of Appeal did not review the evidence. The Court of Review did, Langelier J. delivering a long and elaborate opinion. But he accepts a supposed negligence as proved. He says: 'Mais qu'est-ce qui a amené l'explosion dans la machine? Aucun témoin n'a pu le dire, mais H. M. [the plaintiff McArthur] et Stewart pensent qu'elle a été causée par le fait que, comme cela était arrivé souvent, d'après eux, une cartouche aura été saisie dans le sens de sa longueur par les pinces, et un doigt de celles-ci frappant sur la capsule en a amené l'explosion.' It is of no importance to know what the witnesses think, but what they have seen and can testify as facts. In *Asbestos and Asbestic Co.* v. *Durand* (1) there was indisputable evidence of fault, and not a mere suggestion or surmise as in this case. The plaintiff should have been non-suited."

The Supreme Court reversed the decisions of the Courts below and dismissed the appellant's action.

R. C. Smith, K.C., and *R. A. Greenshilds, K.C.*, for the appellants, contended that the Supreme Court should not on a question of fact found by a jury and approved by the concurrent findings of two Courts have made the order appealed from. There was abundant evidence to support the finding of the jury as to the respondents' negligence, and the verdict was not unreasonable.

[They referred to *Connecticut Mutual Life Insurance Co.* v. *Moore.* (2)]

C. A. Russell, K.C., and *A. Falconer*, for the respondents,

(1) 30 S. C. R. 285. (2) (1881) 6 App. Cas. 644.

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supported the judgment of the Supreme Court on the ground that there was no evidence that the explosion was caused by any fault or neglect of the respondents. Nor was there any evidence of want of reasonable care in supplying suitable machinery or to take proper precautions to prevent an explosion. There was no proof of the origin of the accident or what caused it; it might have happened from causes beyond the respondents' control.

Counsel for the appellant were not heard in reply.

1904
Nov. 11.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal in formâ pauperis from a judgment of the Supreme Court of Canada, setting aside the verdict of a special jury in favour of the appellant. The verdict was unanimous. And it had been upheld by the unanimous judgment of the Court of Review for the district of Montreal, and also by the unanimous judgment of the Court of King's Bench for the province of Quebec. In the Supreme Court Taschereau J. dissented from his four colleagues.

The facts of the case may be stated very briefly. On June 10, 1898, the appellant, who was in the service of the respondent company and then about eighteen years of age, was seriously injured by an explosion at the company's works. There is no direct evidence to shew how the explosion occurred. It seems to have originated in an automatic machine used for filling shells or cartridges with powder and shot. The appellant and another boy of about the same age, who was his superior, were minding the machine at the time. It was the appellant's duty to keep the shells with which the machine was fed supplied with shot and wads. The explosion was instantaneous. The flash communicated through a supply pipe with a powder-box fixed on the outside of the wall of the room in which the machine stood. The box was placed there so that in the event of an accident the explosion might spend itself in the open air. However, for some reason or other, the box had been strengthened externally, and the force of the explosion took effect inwards. The wall was blown in, the machine knocked to pieces, and the room entirely wrecked.

On June 9, 1899, this action was brought in the name and on behalf of the appellant, then a minor, by his tutor. The case on behalf of the plaintiff was that the explosion was owing to the fault of the company. The company, on the other hand, denied responsibility, and alleged that the mishap was caused by the negligence of the plaintiff himself.

The jury found that the explosion occurred through the fault and neglect of the company "by their neglect to supply suitable machinery," and "by their neglect to take proper precautions to prevent an explosion." They also found that the injury of which the plaintiff complained was not "in any way caused by his own fault, neglect, or negligence." And they assessed the damages at $5000.

The learned judge who presided at the trial reserved the case, as he was authorized to do by the Civil Procedure Code, for the consideration of the Court of Review. That Court dismissed with costs a motion on behalf of the company for judgment or a new trial, and confirmed the verdict in favour of the plaintiff. No complaint was made of the learned judge's summing-up or the way in which the questions were left to the jury.

In Quebec, when an unsuccessful party after verdict moves for judgment or a new trial, the function of the Court under the Civil Procedure Code is the same as the function of a Court of Appeal in this country in similar circumstances. It is not the province of the Court to retry the question. The Court is not a Court of Review for that purpose. The verdict must stand if it is one which the jury as reasonable men having regard to the evidence before them might have found, even though a different result would have been more satisfactory in the opinion of the trial judge and the Court of Appeal.

That there was evidence to justify the verdict in the present case can hardly be disputed. The automatic machine, which had been in use for rather over a year, was designed in the works of the company. The designer himself, who was the company's superintendent and apparently a clever and skilled mechanic, and the man who made the machine under his instructions and direction, spoke of it in terms of the highest praise. But no independent expert was called to echo their

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encomium or confirm their view of its suitability for the purpose in hand. It was not patented, but still it does not seem to have been adopted in any other works of the sort. In the judgment of the majority of the learned judges of the Supreme Court, delivered by Girouard J., it is stated that it was "proved that the machine was perfect, and worked regularly and properly." But the company's witnesses did not go so far as that. They admitted that there was room for improvement, and that improvements were to be introduced in a machine that was then being constructed to take its place. The principal fault or defect of the machine seems to have been in the mechanism used in the last stage of the process. When cartridges are charged they have to be "crimped," that is, the edges have to be turned down so as to hold the charge firmly in its place. The design was that each cartridge, when and as it was loaded, should be clutched by automatic fingers and carried off to another part of the machine and there presented, sitting upright on the inside edge of a hollowed cup, to receive the blow or punch which would complete the operation. But these automatic fingers, occasionally at any rate, acted in an uncertain, not to say an erratic manner. Up to the time of the explosion, though no doubt less frequently at the last than at first, cartridges were now and then presented in a wrong posture, and the blow or punch fell sometimes on the side of the cartridge and sometimes on the metal end in which the "primer" or percussion cap had been inserted. The evidence was that a considerable number of these failures occurred from time to time, and that the injured cartridges were collected and sent away to be "scrapped," or broken up. It seems to be not an unreasonable inference from the facts proved that in one of these blows that failed a percussion cap was ignited and so caused the explosion. There was no other reasonable explanation of the mishap when once it was established to the satisfaction of the jury that the injury was not owing to any negligence or carelessness on the part of the operator. The wonder really is, not that the explosion happened as and when it did, but that things went on so long without an explosion. Then, too, the jury may have reasonably thought that the

explosion would or might have been comparatively harmless if the powder-box on the outside had been properly constructed.

The learned judges in the Supreme Court appear to have been much influenced by some decisions in France which are stated by Girouard J. to be "unanimous in exacting proof of a fault which certainly caused the injury." The learned judge had previously observed that "as to the cause of this explosion . . . . we are left entirely in the dark." As recent French decisions, though entitled to the highest respect and valuable as illustrations, are not of binding authority in Quebec, the learned counsel at the bar very properly abstained from examining in detail the cases referred to by Girouard J. It is enough to say that although the proposition for which they were cited may be reasonable in the circumstances of a particular case, it can hardly be applicable when the accident causing the injury is the work of a moment, and the eye is incapable of detecting its origin or following its course. It cannot be of universal application, or utter destruction would carry with it complete immunity—for the employer.

Their Lordships will humbly advise His Majesty that the appeal ought to be allowed, the judgment of the Supreme Court reversed with costs, and the judgment of the Court of King's Bench restored. The respondents will pay the costs of the appeal as in pauper appeals.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondents: *Simpson, Rushworth & Co.*

[HOUSE OF LORDS.]

H. L. (E.) 1904 May 16.

ANDREWS AND OTHERS . . . . . APPELLANTS;

AND

MITCHELL . . . . . RESPONDENT.

Friendly Society—Jurisdiction of Arbitration Committee—Dispute between Member and Society—Expulsion—Friendly Societies Act, 1896, *s.* 68, *sub-s.* 1.

Sect. 68 of the Friendly Societies Act, 1896, which enacts that every dispute between a member of a friendly society and the society shall be decided in manner directed by the rules of the society, and that the decision so given shall be binding and conclusive on all parties without appeal, does not apply to a decision given by the arbitration committee without jurisdiction, the rules having been disregarded upon a question of substance.

A member of a friendly society was duly summoned before the arbitration committee for a breach of the rules, and was in his absence expelled from the society by a resolution of the committee upon a different charge, namely, of fraud and disgraceful conduct, of which no written notice had been given to him as required by the rules:—

Held, that the decision was null and void.

In June, 1902, the respondent, a member of the branch "Golden Grove" of the Foresters' Friendly Society, duly received a written notice to attend on June 19 before the arbitration committee to answer the charge of being out after time when in receipt of sick pay. The respondent attended, and evidence was given that the charge was well founded, and that the respondent had at first given an untrue account of the facts. The respondent was desired to withdraw, and the arbitration committee in his absence passed a resolution expelling him from the society on the ground of fraud and disgraceful conduct. The offence of being out after 9 P.M. when in receipt of sick allowance is dealt with by rule 30 of the rules of Court Golden Grove of the Llanelly United District, whereby a fine of 2*s.* 6*d.* may be imposed.

By law 40, s. 3, of the general laws of the Foresters' Friendly Society, any member proved guilty of fraud, or any conduct or offence calculated to bring disgrace upon the order, before any

recognised arbitration committee, provided a charge has been preferred against him as required by the general laws with regard to arbitrations, may be expelled, or suffer such less penalty as the committee may deem it necessary to inflict.

By law 67, s. 1 (*c*), no case shall be adjudicated upon unless . . . . seven clear days' notice of the time of hearing has been served in writing, with the court stamp affixed, by the chief ranger or under his order, upon the parties or at their respective residences.

In July, 1902, the respondent sued the appellants, as trustees, in the county court of Carmarthenshire, claiming damages for the wrongful expulsion and an injunction. The learned judge held that he had jurisdiction to hear the action, and adjourned the hearing. A summons taken out by the appellants for a writ of prohibition to the county court was dismissed by Darling J., and this decision was affirmed by the King's Bench Division (Lord Alverstone C.J., Wills and Channell JJ.) and by the Court of Appeal (Collins M.R., Stirling and Mathew L.JJ.) upon the authority of *Palliser* v. *Dale*. (1)

The trustees appealed.

By s. 68, sub-s. 1, of the Friendly Societies Act, 1896, "Every dispute between . . . . a member or any person aggrieved who has for not more than six months ceased to be a member of a registered society or branch . . . . and the society or branch . . . . shall be decided in manner directed by the rules of the society or branch, and the decision so given shall be binding and conclusive on all parties without appeal, and shall not be removable into any Court of law or restrainable by injunction; and application for the enforcement thereof may be made to the county court."

May 13, 16. *A. T. Lawrence, K.C.*, and *John Leslie*, for the appellants. There was a dispute between the respondent and the society within the meaning of s. 68 of the Friendly Societies Act, 1896. The Divisional Court and the Court of Appeal acted entirely on the authority of *Palliser* v. *Dale*. (1)

(1) [1897] 1 Q. B. 257.

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That case is distinguishable, the society having acted ultra vires; and the decision was wrong and should be overruled. A domestic tribunal is not divested of authority by a mere irregularity or informality. In the present case the respondent must be taken to have expressly waived all objections, including a formal written notice of the charge upon which he was expelled, and to have submitted himself absolutely to the jurisdiction of the arbitration committee. His only appeal lay under the rules and general laws of the society to the Llanelly United District, and from that tribunal to the final arbitrators. Not having pursued the remedy pointed out by the rules, he is without redress. In any case, the county court has no jurisdiction to hear his complaint until the decision of the arbitration committee has been set aside: *Bache* v. *Billingham*. (1)

S. T. Evans, K.C., and *Ivor Bowen*, for the respondent, were not heard.

EARL OF HALSBURY L.C. My Lords, in this case I feel, as I have no doubt all your Lordships do, the extreme inconvenience of allowing these disputes among friendly societies and their members to come into a Court of law. I feel the force of what Mr. Lawrence said, namely, that we must not insist upon a too minute observance of the regularity of forms among persons who naturally by their education or by their opportunities cannot be supposed to be very familiar with legal procedure, and may accordingly make slips in what is mere matter of form without any interference with the substance of their decisions. I should be anxious myself, as I have no doubt all your Lordships would, to give every effect to their decisions; on the other hand, there are some principles of justice which it is impossible to disregard, and, giving every credit to the desire on the part of this arbitration court to do justice, I think it is manifest that they proceeded far too hastily in this case, and, apart from imputing to them any prejudice or any desire to do wrong, I think that the mode in which the whole thing arose and was disposed of was so slipshod and irregular that it might

(1) [1894] 1 Q. B. 107.

lead to injustice. It is quite possible that if the case, instead of being disposed of in the summary way in which it was disposed of, had been considered by them somewhat more maturely and not while their minds were all inflamed against the very outrageous falsehood told by this man, they might not have taken the extreme measure they did. At all events, treating it as a matter arising in a Court of law, one cannot say that this charge was a charge which was ever made against this man; it arose in the course of the investigation, and they then and there proceeded to deal with it in his absence, and to pronounce a verdict upon it, not having heard him except in the summary way alleged by themselves. He had been told to retire, and he was called in, not for the purpose of further investigation, not for the purpose of hearing what he had to say upon the matter, but simply to be told that the result of the investigation was that he was expelled. My Lords, that as a matter of substance seems to me to be a course of proceeding which it is impossible to support.

When one looks to see what the course of procedure must necessarily be in order to justify an expulsion, Mr. Lawrence points out that there is a rule which certainly does justify expulsion, but it justifies expulsion upon the express proviso that the charge has been made as provided by the rules. In this case the charge never was made as provided by the rules; and if you have no power given under the rules to expel a member except upon a charge made and tried according to the rules, you have no power to expel in a case like this.

My Lords, it seems to me that under these circumstances it would be undesirable to go into those questions which were raised in *Palliser* v. *Dale* (1), because to my mind this most important principle ought to be brought home to the minds of these courts, presided over as they are by comparatively uneducated men, that some of these forms are matters of substance, and that you must summon a man, and you must give him time to consider what he has got to do, and you must give him the charge against him in writing. Those are all matters of substance, and not mere matters of form. They

(1) [1897] 1 Q. B. 257.

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are the foundation of the subsequent litigation arising between the parties, and if they were neglected in this case, it appears to me that there was no jurisdiction to entertain that charge at the time. It is a remarkable thing that the secretary, when he writes to inform the respondent of his expulsion, puts into his letter that which shews clearly enough what in his mind was necessary in order to establish the charge, because he states in plain terms that the charge was made against him by an officer by the direction of the arbitration committee, and that it was investigated and he was found guilty. I do not impute to the secretary when he wrote that any intention of writing what was false, but it was inaccurate. It shews, however, that the secretary knew what the regular course of procedure ought to have been, but it was not pursued.

My Lords, the result to my mind is that the arbitration committee had no jurisdiction to entertain this question, and under those circumstances I think the county court had jurisdiction to do what it did; and therefore this appeal must be dismissed, and I move your Lordships accordingly.

LORD DAVEY. My Lords, I concur in the observations of my noble and learned friend as to the importance of upholding these domestic tribunals of friendly societies, and not lightly interfering with their decisions. But this is not in my opinion a question of irregularity or informality—it is a question of substance. It is a serious thing to expel a man from a society of which he has been a member, I think it was stated in this case for eighteen years, or something of that kind, and who has no doubt paid his subscriptions for a long period. And although such a power is necessary for the due administration and harmonious working of the society, and a power for that purpose is therefore properly given by the rules, it ought always to be exercised in accordance with the conditions imposed by the rules. I need not repeat what my noble and learned friend has said, that in this case the rules expressly provide that expulsion shall only take place on a charge which has been properly made according to the rules. It is not contended by Mr. Lawrence that this charge was made properly

according to the rules, but he regarded that as a mere informality which might be set right. But it was an informality which went to the root of the jurisdiction, and the omission to follow the directions of the rules for preferring charges has had the unfortunate effect of making the resolution which was come to for the expulsion of the respondent, in my opinion, altogether null and void. Therefore I think that the county court was properly appealed to to set aside that resolution.

LORD JAMES. My Lords, I concur.

LORD ROBERTSON. My Lords, I entirely agree in what has been said by my noble and learned friends. The Act of 1896 has not given carte-blanche to the tribunals of these societies to pronounce decisions which shall be exempt from examination in Courts of law. The decisions protected from review are constitutional decisions—decisions pronounced according to the rules, which, as we know, are registered under the Friendly Societies Acts. Now the rules require written notice of a charge such as we are here dealing with. In proceedings involving the grave issue of expulsion the importance of this safeguard stands out as salient. What happened in this case shews what may take place if this rule be disregarded. This respondent, called to answer a minor accusation, is, on the trial of that charge, then and there accused of another and graver charge, and then and there expelled. This invasion of the respondent's rights most clearly transcends the class of irregularities, and calls for the intervention of the Courts.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 16, 1904.

Solicitors: *Shaw, Tremellen & Co., for S. Ward, Dudley; Purkis & Co., for H. J. King, Salisbury.*

[HOUSE OF LORDS.]

H. L. (E.) 1905 Feb. 7.

COMISKEY AND OTHERS . . . . . APPELLANTS;

AND

BOWRING-HANBURY AND ANOTHER . . RESPONDENTS.

Will — Construction — Precatory Trust—Absolute Gift "in Confidence" — Executory Gift over in Default of Disposition by Will of Absolute Donee— Absolute Gift subject to Executory Gift over.

A testator gave devised and bequeathed to his wife "the whole of my real and personal estate and property absolutely in full confidence that she will make such use of it as I should have made myself and that at her death she will devise it to such one or more of my nieces as she may think fit and in default of any disposition by her thereof by her will or testament I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces":—

Held (by the Earl of Halsbury L.C. and Lords Macnaghten, Davey, James, and Robertson, Lord Lindley dissenting), that upon the true construction of the will there was an absolute gift of the testator's real and personal estate to his wife subject to an executory gift of the same at her death to such of his nieces as should survive her, equally if more than one, so far as his wife should not dispose by will of the estate in favour of such surviving nieces, or any one or more of them.

The decisions of Kekewich J. and the Court of Appeal, *In re Hanbury*, [1904] 1 Ch. 415, reversed.

IN 1893 the Right Hon. R. W. Hanbury, M.P., made his will, of which the material part is as follows:—

"I give bequeath and devise to my very dear wife Ellen Hanbury the whole of my real and personal estate and property absolutely in full confidence that she will make such use of it as I should have made myself and that at her death she will devise it to such one or more of my nieces as she may think fit and in default of any disposition by her thereof by her will or testament I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces

"I make this will in full confidence that my dear wife

will show the affection of a daughter to my dear mother and stepfather

"I appoint my said wife Ellen Hanbury and Charles Fisher of Brownhills colliery manager executrix and executor of this my will and I give the said Charles Fisher such sum not exceeding 150*l.* as my dear wife may decide upon."

The testator died in 1903 never having had a child, and leaving real and personal property of large value, of which a considerable part consisted of freehold and leasehold collieries. The widow having taken out an originating summons to determine the construction of the will, Kekewich J. made an order declaring that upon the true construction of the will the real and personal estate was given to the widow absolutely, and this decision was affirmed by the Court of Appeal (Vaughan Williams and Stirling L.JJ., Cozens-Hardy L.J. dissenting). (1)

The nieces appealed.

Warmington, K.C., and *Christopher James*, for the appellants. In construing a will the words of the testator must first be construed irrespectively of rules of law, real or imaginary: *Pearks* v. *Moseley*. (2) And the whole will must be looked at in order to find out what the testator's intention was. Looking at the whole of this will there was a plain intention to benefit the testator's nieces. This intention may be given effect to by construing the word "confidence" to mean "trust," or by observing the gift over. "Confidence" is a good old-fashioned word for signifying a trust reposed by one person in another—to wit, "use, confidence or trust": Statute of Uses, s. 1, and Co. Litt. 272 b. So reading the will there was a trust for such one or more of the nieces as the testator's wife should devise the property to, and in default for the surviving nieces equally. Kekewich J., whose decision was followed by the majority of the Court of Appeal, rejected this construction upon authority (interpreting the will of one testator by the words of another), and especially the authority of *In re Williams* (3),

(1) [1904] 1 Ch. 415. (2) (1880) 5 App. Cas. 719.
(3) [1897] 2 Ch. 12.

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where all the authorities are collected. But that case is really in favour of the appellants. There (and in other cases relied on below) there was no express gift over. Here there is, and that makes all the difference; there is no need to imply or infer a gift over. The respondents' construction entirely ignores the gift over, or attempts to get rid of it by calling it repugnant. Looking at the whole will the true construction is that the wife took an absolute gift subject to this limitation, that if she did not devise the property to one or more of the testator's nieces, the property should at her death be equally divided between the surviving nieces.

[They also referred to *Bowen* v. *Lewis* (1), and the cases cited in the Courts below. See also *Oldfield* v. *Oldfield*. (2)]

Haldane, K.C., and *Jenkins, K.C.*, for the respondent, the testator's widow, now Mrs. Bowring-Hanbury. The words "in full confidence" mean that the testator's wife might carry out his wishes, not that she should have no option. Lord St. Leonards (Sugden, Law of Property, ed. 1849, p. 376) says that "in nearly every recent case" where words of recommendation, confidence, request or the like are attached to an absolute gift, the gift has been held to be uncontrolled by the request, recommendation, or confidence expressed; and that it is not an unwholesome rule that if a testator really means his recommendation to be imperative he should express his intention in a mandatory form. And this view was adopted by Lindley and A. L. Smith L.JJ. in *In re Williams*. (3) The gift over is void as repugnant to the previous absolute gift: *Holmes* v. *Godson* (4) and *In re Wilcock's Settlement*. (5) Moreover even if valid it would be of little use to the appellants unless the words "any disposition by her thereof" are read "any such disposition." There is no justification because there is no necessity for importing the word "such." Words must receive their ordinary and natural meaning, and so read "any disposition" means a disposition by any legal method in favour of anybody. The testator intended that if his wife was

(1) (1884) 9 App. Cas. 890.
(2) [1904] 1 Ch. 549.
(3) [1897] 2 Ch. 12.
(4) (1856) 8 D. M. & G. 152.
(5) (1875) 1 Ch. D. 229.

so minded his nieces should benefit, but by her bounty and not otherwise.

L. W. Byrne, for the respondent Fisher, executor.

Warmington, K.C., in reply. The words "any disposition" must be read in their natural sense and connected with the disposition immediately before referred to, the disposition in favour of the nieces, the only disposition in the testator's mind. A condition may be annexed to an absolute devise in fee: *In re Macleay* (1), per Jessel M.R.

EARL OF HALSBURY L.C. My Lords, in this case the discussion appears to me to lie in a very narrow compass. The question which your Lordships have to decide turns upon a very few words. For my own part I am not able to entertain the doubt which appears to have prevailed in the Court from which the case originally came and the majority of the Court of Appeal. The situation of the parties, of course, is to be considered, and the question whether this was property which the testator contemplated remaining intact and not subject to any diminution until the time of his wife's death is an important factor in the construction of the words. To my mind it appears manifest that he did contemplate that the property which he left to her was to remain so that she would have the power of making some disposition of it at the period of her death, whatever that disposition might be, which is the question which your Lordships have in fact to determine.

I cannot help thinking that enough has not been made of the mode in which the estate is given to her; it is all in one sentence: "I give, bequeath and devise to my very dear wife Ellen Hanbury the whole of my real and personal estate and property absolutely in full confidence that she will make such use of it as I should have made myself and that at her death she will devise *it*." I pause there for a moment. Reading that, I come firmly to the conclusion that he did contemplate that the property which he left was to remain, and the first inference I draw is that he did not contemplate that during

(1) (1875) L. R. 20 Eq. 186.

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her lifetime she would have disposed of it in any way or placed upon it such an irrevocable character, either by way of settlement or anything else, that at the time when she died herself it would have passed away from her power of disposition.

Earl of Halsbury L.C.

My Lords, the next thing that occurs to me is that he does contemplate that she might make a will herself, and that those words, "in default of any disposition by her thereof by her will," ought to be read with the other words, so that what he is contemplating is, first of all, that the property is to remain capable of being left by her, and, secondly, that she may have made a will, but have made no disposition of that particular property which she has come into possession of under his will.

Then, as Mr. Warmington pointed out, he gives directions. I cannot think that if it was in his mind that she was to be absolute owner and to do what she pleased with it he would, after he had given her a complete power of disposition, use such a phrase as "I hereby direct." To my mind it is clear that he is contemplating that she shall have the full use of the property during her lifetime, and that after her death one or more of his nieces is to be the object of his bounty, and if his widow does not select one or more, then they are all to share alike. That, to my mind, is the meaning of the language. I do not stop to bring in any rules of law or any canons of construction. I look at the words merely as they stand in the will, and I think the natural and ordinary meaning of those words is what I have suggested.

The language which is relied upon in the gift to Charles Fisher is, I think, not absolutely immaterial. It is, in one sense, a small point; but it looks as if the testator had in his mind that when she was in possession of whatever it was she was to be in possession of, she was not to be able to do what she would with it; her power even to give such a sum as 150*l.* is limited, and that in language which I think is not subject to any ambiguity at all: "I give the said Charles Fisher such sum not exceeding 150*l.* as my dear wife may decide upon." It seems to me that that would be an extraordinary thing for

him to do if he supposed that she was to be an absolute owner, with power to determine in what way every part of the capital of the estate should go.

My Lords, under these circumstances I am unable to agree with the judgment of the Court of Appeal, and I move your Lordships that that judgment be reversed.

LORD MACNAGHTEN. My Lords, I am of the same opinion, and I accept and adopt the judgment of Cozens-Hardy L.J.

LORD DAVEY. My Lords, I agree, and I will only out of respect to Vaughan Williams and Stirling L.JJ. add a very few words.

The words which have been so much commented upon, "in full confidence," are, in my opinion, neutral. I think it would be impossible to regard them as technical words in any sense. They are words which may or may not create a trust, and whether they do so or not must be determined by the context of the particular will in which you find them. In the present case I do not think it necessary to determine any such question.

We have been enjoined a great many times by the learned counsel on both sides of the bar that we must read the whole will in the first instance. I have obeyed that direction, and I observe first that the testator obviously intended that his nieces should have an interest in and should be entitled to this estate in some event. And, secondly, that although he directed it in the last resort to go to his nieces, he hoped or believed, or, to use his own words, "had confidence," that they or some of them would take the estate through the testamentary bounty of the widow.

Reading the will without paying any attention to legal rules, and for the purpose only of seeking the testator's intention and the meaning of the words he used, it is obvious that he did not intend that his wife should have an absolute power to dispose of the estate in her lifetime or otherwise than by her will.

I do not myself attach any great importance to the use of the word "absolutely." Reading it as qualifying or expressing

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the estate which the wife had to take, it does not seem to me to do more than to give her a fee simple. It is now admitted that she has a fee simple, and the question is whether there is a good executory limitation capable of taking effect upon her death. The use of the word "absolutely," as defining the amount of the estate which is given to the wife, must of course be subject to any executory limitation or any other valid limitation or exception which you find engrafted on that estate in fee simple; therefore I attach no importance, or very little importance, to the use of the word "absolutely."

My Lords, in my opinion the question really is this: Do those words, "in default of any disposition by her thereof by her will or testament," mean any disposition in favour either of the nieces or anybody else, or are they, as Mr. Warmington contended, to be construed as relating to such a disposition as that which he has expressed his confidence that his wife would make? That is a point which it is impossible to labour, and I do not know that I can add anything to what the Lord Chancellor has said upon it, or that I can do anything more than express my entire agreement with him. I think that is the most natural way of reading the will, and I come to the conclusion that the testator is speaking only of a default of any such disposition as he had expressed his confidence that his wife would make, and, if so, I am of opinion that there is a good executory limitation.

Therefore, even if you treat the words "in confidence" as only expressing a hope or belief, the will would run thus: "I hope and believe that she will give the estate to one or more of my nieces, but if she does not do so, then I direct that it shall be equally divided between them." I think that is a perfectly good limitation. The true antithesis I think is between the words "such one or more of my nieces as she may think fit" and the words "equally divided between my surviving said nieces."

I do not think it in the view I take of the construction important in this case, but I observe that in some of the cases to which Mr. Warmington drew our attention the absence of any such gift over, the absence of any direction such as we

find in default of a bequest by the widow, is made a strong point for not holding that the words "in confidence" or similar words created an obligatory trust.

LORD JAMES. My Lords, I have very few words to add to the judgments that have already been delivered and in which I concur. It is admitted on all hands that our only duty is to discover what was the intention of the testator, and that we must make that discovery from the words used in the will.

Now, my Lords, I do not enter, of course, into any consideration of the particular mental powers of the testator, but we must treat him who made the will as a person of ordinary common sense meaning something by the words he wrote. It is contended on the one hand that this was a disposition of an unfettered fee simple estate to the widow. If that had been so, it would have been very easy to have left out the words that appear subsequently to those first words in the will. There is in that contention no meaning whatever given to the words that follow, namely, the phrase, "And in default of any disposition by her thereof" the estate is to go to his nieces. I do not think we can shut out those words from the construction of this will, but I can quite conceive that, the word "absolutely" being used, we have to find some reason why in the first disposition he should have used the word "absolutely," and in the second there should have been this gift over to the nieces. I think the meaning of the testator from a common-sense point of view is clear enough. He wished his widow to have a life estate in his property, and he then wished after that life estate that it should be left to his nieces —to those of his own blood. If he had made the disposition at that time in 1893 he must have selected the objects of his bounty without relation to what would be their condition at the time of his wife's death. There are seven nieces. We have no evidence about it, but I infer from one of them being an infant now that they were young ladies at the time of the will. At the time of the widow's death they would be in different conditions, deserving a different amount of beneficial

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gift. One might have married a rich man and another might have married a poor man, and one might have a large family and another none, and one might not be married at all. Therefore it was that he wished the power of selection to be given at a time more or less approaching that at which they would be recipients of the bounty. For that reason he asked his wife to take care that the nieces should have the estate subject to her selection of the individual nieces and a division of the property apportioned between them as she thought fit. That was apparently a most sensible, businesslike, common-sense view of the position which Mrs. Hanbury was likely to take up in relation to these ladies; and I believe that was the whole intention of this will.

LORD ROBERTSON. My Lords, I entirely agree.

LORD LINDLEY. My Lords, I am sorry to say I am unable to come to the same conclusion. Having regard to the opinions already expressed it is impossible to say that a trust for the nieces, or at least for one of them selected by the wife, cannot be extracted from this will; but, personally, I think the construction adopted by Stirling L.J. is more in accordance with the language used than the construction contended for by the appellants. The wife was, in my opinion, intended to be the absolute owner, free from any legal or equitable obligation in favour of anybody and free from any executory gift over. I admit that a different construction can be put upon the will, but that does not appear to me to be the natural one.

Judgment of Kekewich J. and order of the Court of Appeal reversed with a declaration that according to the true construction of the will the testator's real and personal estate was given to his wife absolutely, subject to an executory gift of the same at her death to such of the testator's nieces as should survive her, to be equally divided among them if more than one, in case and so far as the wife

should not dispose by will of the said estate in favour of such surviving niece or nieces, or any one or more of them: cause remitted to the Chancery Division.

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Lords' Journals, February 7, 1905.

Solicitors: *Walker, Martineau & Co.; Patersons, Snow & Co.*

[HOUSE OF LORDS.]

ELDERSLIE STEAMSHIP COMPANY, LIMITED . . . . . APPELLANTS;

AND

BORTHWICK . . . . . RESPONDENT.

H. L. (E.) 1905 *Feb.* 16.

Ship—Bill of Lading—Construction—Exceptions—Warranty as to Seaworthiness.

Frozen meat shipped for carriage from Melbourne to London arrived tainted with carbolic acid, with which the ship had been disinfected before shipment. The bill of lading contained two exception clauses. The first exempted the shipowner from liability for damage to goods whether arising from a defect existing at the time of the shipment or not, or from the neglect of the master or crew, or from any other cause whatsoever. The second clause also exempted the shipowner from liability for damage from defects, &c., "if reasonable means have been taken to provide against such defects and unseaworthiness":—

Held, that upon the true construction of the bill of lading the generality of the first clause was qualified by the second clause, and that, reasonable care not having been taken in cleansing the ship before the shipment, the shipowner was liable for the damage in an action brought by an indorsee of the bill.

The decision of the Court of Appeal, [1904] 1 K. B. 319, affirmed.

FROZEN meat was shipped on the appellants' steamship for carriage from Melbourne to London. The bill of lading contained two exception clauses. The first (in large print) provided that, "Neither the steamer nor her owners nor her charterers shall be accountable for the condition of goods shipped under this bill of lading nor for any loss or damage

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thereto, whether arising from failure or breakdown of machinery, insulation or other appliances, refrigerating or otherwise, or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not, nor for detention; nor for the consequences of any act, neglect, default or error of judgment of the master, officers, engineers, refrigerating engineers, crew or other persons in the service of the owners or charterers, nor from any other cause whatsoever." The second clause (in small print) contained the following words: "perils of the seas, rivers or navigation of whatsoever nature or kind, and howsoever caused; whether or not any of the perils, causes or things above mentioned, or the loss or injury arising therefrom, be occasioned by or arise from any act or omission, negligence, default or error in judgment of the master, pilot, officers, mariners, engineers, crew, stevedores, ship's husband or managers, or other persons whomsoever in the service of the owners or charterers; whether on board the said ship, or on shore, or on board any other ship belonging to or chartered by them, or for whose acts they would otherwise be liable whether such act, omission, negligence, default, or error in judgment shall have occurred before or after the commencement of or during the voyage, or any other causes beyond the control of the owners or charterers, or by or from any accidents to or defects latent or otherwise in hull, tackle, boilers or machinery, refrigeration or otherwise, or their appurtenances (whether or not existing at the time of the goods being loaded, or the commencement of the voyage), or insufficiency of coals at the commencement or any stage of the voyage, if reasonable means have been taken to provide against such defects and unseaworthiness."

The meat arrived in London damaged. In an action brought by an indorsee of the bill of lading against the appellants, Walton J., who tried the case without a jury, found as a fact that the meat had been tainted by carbolic acid which had been used before the shipment to disinfect the holds and other parts of the ship, and that if proper skill and attention had been paid to the cleansing and preparation of

the ship before she left Melbourne the damage would not have happened. The learned judge held upon the construction of the bill of lading that the shipowners were exempt from liability, and entered judgment for the defendants. This decision was reversed by the Court of Appeal (Lord Alverstone C.J., Collins M.R., and Romer L.J.), who entered judgment for the plaintiff, the damages to be assessed by a referee. (1)

The shipowners brought the present appeal.

Carver, K.C., and *Leck*, for the appellants. The view of Walton J. was that the damage came clearly within the general words of the first exception clause, which protected the shipowner; and that the second clause, "very long and much more verbose" than the first clause, was much narrower and more limited; and that the question was whether the wider clause was to be cut down by the narrower, or the narrower extended by the wider. Being of opinion that they could not be reconciled, his Lordship held that the plain common sense was that the first clause had been put in for the express purpose of giving a wider scope to the narrower clause, and that it was most unnatural to say that the wider clause was cut down by the narrower; that the shipowner had his doubts about the narrower clause, and therefore to make the matter clear inserted the first clause, plain, intelligible and far-reaching. This seems to be the rational construction.

[They discussed the cases cited in the Court below.]

J. A. Hamilton, K.C., and *Maurice Hill*, for the respondent. If the shipowner wishes to escape liability for the implied warranty of seaworthiness he must make the matter perfectly clear. No one can say this bill of lading is perfectly clear. It is impossible to reject either clause, the two clauses whether reconcilable or not must be read together so far as they can, and so reading them the first clause is qualified by the second.

Carver, K.C., in reply.

EARL OF HALSBURY L.C. My Lords, I do not think it necessary to quote any authority in this case. Construing

(1) [1904] 1 K. B. 319.

H. L. (E.) 1905 ELDERSLIE STEAMSHIP COMPANY v. BORTHWICK. Earl of Halsbury L.C.

this instrument and applying to it the ordinary canons of construction, I must move your Lordships that this appeal be dismissed.

It seems to me that if what has been called the large print had stood alone I should not have had the smallest doubt that it would have carried the shipowner the whole way. I can give no other construction to it than that which the words express; but the difficulty in his way is that he has thought proper to execute an instrument which has two different sets of phrases in it, and one rule of construction which must prevail is that you must give effect to every part of a document if you can—you must read it as a whole. Mr. Carver has ingeniously spoken of independent contracts and independent paragraphs and so on, but we must remember that this is one contract, and each of the parts of this contract must be read so as to give effect to the whole if it can.

My Lords, the only mode of so reading it is to read the first part of it thus: "I am not to be liable for this," and then what comes after it by way of exception, "I shall not be liable unless I have failed to take all reasonable means against the injury" that has happened. In that way you can read the two together, and this seems to me to be the only way in which you can make a reasonable and intelligible contract, and give effect to the words which the parties have agreed to.

Under these circumstances it seems to me that the appeal ought to be dismissed, and I move your Lordships accordingly.

LORD MACNAGHTEN. My Lords, I am of the same opinion. The clause which has been called the large print clause seems to me to be perfectly clear. The small print clause is equally clear. For my part I am unable to reconcile the two clauses. In such a case as this an ambiguous document is no protection. It is a wholesome rule that a shipowner who wishes to escape the liability which might attach to him for sending an unseaworthy vessel to sea must say so in plain words.

LORD LINDLEY. My Lords, I am of the same opinion. This is a contract between two persons, one of whom, the

shipowner, prepared it. I have not the slightest doubt the shipowner understood it as Mr. Carver says he did. But when I look at it from the other side, and consider whether the shipper would so understand it, I say, if I were myself a shipper, certainly I should not. I should find that the defects which were to render the ship unseaworthy were only to be excepted if reasonable means had been taken to provide against them. That is how I should read it as a shipper, although the shipowner would not. It appears to me that the vice of Walton J.'s admirable judgment is that he has rather lost sight of what would be reasonably plain to the shipper. I quite agree with the principle on which the Lord Chancellor and my noble and learned friend have proceeded in deciding this case. I agree that this bill of lading did not employ plain terms and relieve the shipowner from liability in the case of unseaworthiness. I mean by "plain terms" terms sufficiently plain to the shipper for him to understand it: he would not understand it in the sense contended for by Mr. Carver.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, February 16, 1905.

Solicitors: *Lowless & Co.; Waltons, Johnson, Bubb & Whatton.*

[HOUSE OF LORDS.]

H. L. (E.) 1905 Feb. 17.

BOLITHO & CO., LIMITED . . . . APPELLANTS;

AND

GIDLEY AND OTHERS . . . . . RESPONDENTS.

Husband and Wife—Judgment against Married Woman—Separate Estate—Restraint against Anticipation—Income due after Judgment—Married Women's Property Act, 1882 (*c.* 75), *ss.* 1, 19.

When judgment is obtained against a married woman payable out of separate estate held in trust for her without power of anticipation, income accrued due after the date of the judgment cannot be attached in the hands of the trustees to answer the judgment.

Whiteley v. *Edwardes*, [1896] 2 Q. B. 48, approved.

THE appellants, a banking company, recovered against a customer, a married woman, judgment (payable out of her separate estate) for the balance of a banking account, and obtained a garnishee order nisi against her trustees the respondents to attach all debts owing or accruing due from the respondents to the married woman. The separate estate was held in trust for the married woman for her life without power of anticipation, and the respondents were in the habit of paying into the appellants' bank to the credit of the married woman the income of the trust fund. Between the date of the judgment and the garnishee order the respondents received income which was not due at the date of the judgment. The appellants contended that the respondents were bound to pay over to the appellants not only the married woman's income which had accrued due at the date of the judgment, but also the income which had accrued due since the judgment. The master held that the order to pay over to the appellants must be confined to income due at the date of the judgment, and this decision was affirmed by the judge at chambers and the Court of Appeal (Romer and Cozens-Hardy L.JJ.) on the authority of *Whiteley* v. *Edwardes*. (1) Hence the present appeal.

(1) [1896] 2 Q. B. 48.

Feb. 16, 17. *Duke, K.C.*, and *Morten*, for the appellants. This case is virtually an appeal from *Whiteley* v. *Edwardes* (1), where it was held by the Court of Appeal that a judgment against a married woman payable out of her separate estate cannot be enforced against arrears of income accruing due after the date of the judgment where there is a restraint against anticipation. The point now in question was not decided by this House in *Hood Barrs* v. *Heriot* (2), where it was held that the restraint on anticipation does not apply to income accrued due, so that the judgment can be enforced against income which has accrued due at or before the date of the judgment. The ground of that decision was that as soon as income becomes due the married woman can alienate it. On that principle there is no limit to the date, and the income can be attached as soon as it becomes due. If not, the creditor must bring an action on the judgment as often as the income becomes due, which produces the same effect with a waste of time and money. There is no limit to the date fixed by the Married Women's Property Act, 1882 (c. 75), s. 1, sub-s. 2, which makes a judgment against a married woman payable out of her separate estate and not otherwise, where the liability is in respect of her separate contract. Sect. 19, which says that the Act shall not interfere with or render inoperative any restriction against anticipation, does not affect the appellants' contention, because as soon as the income becomes due the married woman can alienate it, i.e., it can be attached. A judgment against a married woman since that Act is a true judgment, with all the consequences as to execution, as if the woman was a feme sole: *Perks* v. *Mylrea* (3), per Field J. at chambers; *Holtby* v. *Hodgson* (4); *Hyde* v. *Hyde* (5), per Cotton L.J.; *Cox* v. *Bennett*. (6) The decision of the Court of Appeal in *Hood Barrs* v. *Cathcart* (7) against the present appellants' contention must be taken to have been overruled or reflected upon by the judgment of Lord Herschell in *Hood*

(1) [1896] 2 Q. B. 48.
(2) [1896] A. C. 174.
(3) [1884] W. N. 64.
(4) (1889) 24 Q. B. D. 103.
(5) (1888) 13 P. D. 172.
(6) [1891] 1 Ch. 617.
(7) [1894] 2 Q. B. 559.

H. L. (E.) 1905

BOLITHO & Co., LIMITED v. GIDLEY.

Barrs v. *Heriot*. (1) The Married Women's Property Act, 1893, does not affect the appellants' contention.

Danckwerts, *K.C.*, and *Abrahams*, for the respondents, were not heard.

EARL OF HALSBURY L.C. My Lords, so far as I am concerned I have listened with great attention to the very ingenious argument presented by the learned counsel at the bar, but it appears to me that the whole question comes back to what has been the operation of the Acts of Parliament referred to. I have been unable to follow any suggestion which would not have the effect of defeating the Acts of Parliament if the proposition insisted upon here were maintained.

My Lords, I do not think the matter is susceptible of very lengthened exposition. In my view the Acts of Parliament have prohibited in effect the execution which is insisted upon here, and beyond saying that that is my view of the true construction of the two Acts referred to, I am unable to go any further. It appears to me impossible to expound in any clearer way the operation of the statutes otherwise than by the language of the statutes themselves.

Under these circumstances I content myself with saying that I think this appeal ought to be dismissed.

LORD MACNAGHTEN. My Lords, the case appears to me to be absolutely clear, and in my opinion the judgment appealed from is perfectly right. If effect were given to the contention of the appellants it would defeat the Act of 1882, and render the restraint upon anticipation absolutely inoperative. No doubt a married woman restrained from anticipation would still be unable to give a security for advances; but those who had ministered to her extravagance would find a security in a judgment against her of an anticipatory character, swooping down upon her property from time to time as and when received; and so the restraint on anticipation would be of no avail.

I entirely agree in the judgment which has been proposed.

(1) [1896] A. C. 174.

LORD LINDLEY. My Lords, I think this is a hopeless appeal. The Married Women's Property Acts emancipated married women from legal disabilities, but not from the disability which the Courts of Equity put them under by restraining them from anticipation. This matter was very carefully considered in *Scott* v. *Morley* (1), *Hood Barrs* v. *Cathcart* (2), and *Whiteley* v. *Edwardes.* (3) Those cases are all opposed to this appeal. The reasoning is based upon the language of the Act of 1882, and I do not see any answer to that reasoning. If you look at the other cases referred to, there is not one which helps the appellants. *Holtby* v. *Hodgson* (4) does not help them; nor does *Hyde* v. *Hyde* (5); nor does *Cox* v. *Bennett* (6) nor *Hood Barrs* v. *Heriot.* (7) As regards the Act of 1893, whatever may be said of it, it does not help the appellants.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, February 17, 1905.

Solicitors: *Ravenscroft, Woodward & Co., for Woollcombe & Sons, Plymouth; Blair & W. B. Girling, for G. Gidley & Son, Plymouth.*

(1) (1887) 20 Q. B. D. 120.
(2) [1894] 2 Q. B. 559.
(3) [1896] 2 Q. B. 48.
(4) 24 Q. B. D. 103.
(5) 13 P. D. 166.
(6) [1891] 1 Ch. 617.
(7) [1896] A. C. 174.

[HOUSE OF LORDS.]

H. L. (E.) 1905 Feb. 27.

MAAS . . . . . APPELLANT;

AND

PEPPER . . . . . RESPONDENT.

Bill of Sale—Loan—Hire and Purchase Agreement—Inference of Fact—Registration.

M., who had made a contract to buy a hotel and its furniture, being unable to find all the money, agreed with a wine merchant that he should provide 2000*l.* The wine merchant went to the vendor and paid him 2000*l.*, the vendor giving a receipt for that sum as the purchase-money of the furniture. The same day the wine merchant and M. signed a hire-purchase agreement by which the wine merchant let and M. hired the furniture for 2412*l.* to be paid by instalments, the furniture not to become the property of M. till all the instalments were paid. The purchase of the hotel was then completed and M. took possession. After paying some of the instalments M. became bankrupt:—

Held, that the circumstances shewed that as a matter of fact the sale to the wine merchant was only colourable, that the transaction between the wine merchant and M. was really a loan upon the security of the hire-purchase agreement, and that that agreement not having been registered under the Bills of Sale Acts was void as against M.'s creditors.

The decision of the Court of Appeal, *Mellor* v. *Maas*, [1903] 1 K. B. 226, affirmed.

SYKES made a written contract with Mellor to sell to him a freehold hotel with the furniture, &c., for 30,000*l.*, of which 27,000*l.* was to remain on mortgage. Mellor not having more than 1000*l.* asked Maas, the appellant, a wine merchant, to lend him 2000*l.* on mortgage, which the appellant declined, and Mellor declined to give a bill of sale. Mellor and the appellant then came to an understanding which was carried out as follows. On May 15, 1899, the day for completing the purchase, the appellant, who had been advised that the furniture was worth about 3000*l.*, went to Sykes and offered to buy the furniture for 2000*l.*, saying that otherwise the purchase could not be completed. The appellant gave Sykes 2000*l.* and Sykes gave him a receipt for that sum as the purchase-money of the furniture. The appellant then went to

Mellor and they executed a hire-purchase agreement by which the appellant let the furniture to Mellor for 2412*l.* 16*s.* to be paid by instalments, the furniture to become the property of Mellor when the instalments were fully paid and not till then, and meanwhile not to be removed from the hotel. At the same time Mellor signed an agreement to buy all his wine and spirits from the appellant till the instalments were paid. The purchase of the hotel was completed the same day and Mellor took possession. After paying some instalments Mellor became bankrupt in December, 1900. The respondent, trustee in bankruptcy, brought an action against the appellant claiming (1.) a declaration that the hire-purchase agreement was void under the Bills of Sale Acts, 1878 and 1882, for want of registration and that the furniture was vested in the respondent as trustee in bankruptcy; (2.) an order for payment to the plaintiff of 1730*l.*, the agreed value of the furniture. At the trial before Wright J., Sykes was called as a witness and said that the appellant had told him that Mellor was short of money for the completion and that he (the appellant) would lend Mellor some money. The appellant was not called as a witness.

Wright J. came to the conclusion that the appellant was trustee of the furniture for Mellor, the real owner, and that the transaction was really a loan to Mellor on the security of the hire-purchase agreement, and he entered judgment for the respondent. (1) This decision was affirmed by the Court of Appeal (Collins M.R., Romer, and Mathew L.JJ.) (2)

On the hearing of this appeal there was no controversy as to the law, the question being treated as one of fact.

Feb. 20, 21, 27. *Herbert Reed, K.C.*, and *Frank Mellor* (*G. A. Layton* with them), for the appellant, contended that there was a novation, the original contract to sell the hotel and furniture for a lump sum to Mellor being set aside and the furniture being bonâ fide sold to the appellant.

Shearman, K.C., and *Horace J. Rowlands*, for the respondent, contended that the sale to the appellant was merely

(1) [1902] 1 K. B. 137. (2) [1903] 1 K. B. 226.

H. L. (E.) 1905 MAAS v. PEPPER.

colourable, and that Wright J. and the Court of Appeal had drawn the right inference from the facts.

Frank Mellor, in reply.

EARL OF HALSBURY L.C. My Lords, I do not think it is necessary to go through all the facts of this case. I think Wright J. came to the right conclusion upon a question of fact. It seems to me that the whole of the evidence points in one direction. I do not think the sale to Mr. Maas was a reality. I think the obvious purpose was that Mr. Maas was to lend 2000*l.*, to get the security of the furniture and yet not to be within the Bills of Sale Act: that was the whole object so far as this transaction was concerned. Everything raises a very strong presumption that this was a colourable sale. The only thing that would have brought me to a different conclusion would have been if Mr. Maas himself had been called and had given a perfectly clear and credible account of how it was that the original arrangement was completely altered by all the parties, and that he was to become the vendee of these goods. I do not think he ever was that. It was for those who insisted upon the sale of the furniture being a real and bonâ fide one to prove it. In my view the judgments of Wright J. and the Court of Appeal were right, and I move your Lordships that the appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion, but with some hesitation. The learned judge has found that this was not a real sale to Maas, but a sale to Maas on behalf of Mellor, and, having regard to the fact that Maas was not called and consequently not subjected to cross-examination, I am not prepared to differ from the learned judge.

LORD JAMES. My Lords, I am disposed to agree with the judgment of your Lordships, but I am in much the same position as my noble and learned friend Lord Macnaghten. The case comes before us upon an allegation that a wrong inference has been drawn from facts which are not in dispute. If that is so, I think this House ought to deal with great

consideration with the inference which has been drawn by the learned judge who heard the case in the first instance, and secondly by the Court of Appeal. For my own part, I am not quite certain that I should have drawn the same inference from the facts; but I am of opinion that there has not been enough established here to shew that the inference which was drawn by Wright J., a judge of very great experience in matters of bankruptcy, and by the learned judges in the Court of Appeal was certainly wrong.

LORD LINDLEY. My Lords, I think the decision of Wright J. was perfectly correct. I should have come to the same conclusion myself. I have not the slightest hesitation in saying that this was a loan on security, and that there was no sale at all.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, February 27, 1905.

Solicitors: *Edward Betteley; Wellington Taylor, for Rowlands & Co., Birmingham.*

[HOUSE OF LORDS.]

H. L. (E.) 1905 March 3.

CHAPMAN AND OTHERS . . . . . APPELLANTS;

AND

PERKINS . . . . . RESPONDENT.

Will—Construction—Intention—Forfeiture Clause—Words of Futurity—Limitation to Events after Testator's Death.

A testator by will left property in trust for his children, and declared that if any son or daughter should alienate his or her share or become bankrupt, or marry a person of any degree of kindred unless more remote than third cousin, or if a daughter marry without the previous written consent of the trustees, his or her share and interest should "thenceforth cease and determine." A daughter married a first cousin between the date of the will and the testator's death:—

Held, that, upon the true construction of this particular will, the testator intended that as to marriage the forfeiture should take effect only in the case of a marriage after the testator's death, and that the daughter had not forfeited her interest.

The decision of the Court of Appeal, [1904] 1 Ch. 431, affirmed.

EDWARD CHAPMAN by his will left real and personal property in trust for his wife and children, and declared "that if any son or daughter of mine shall do or suffer any act whether by way of alienation, charge or otherwise and including any act under any statutes of bankruptcy or for the relief of insolvent debtors for the time being by reason or means whereof any part or share of him or her in any income or capital of my said estate to or of which he or she shall not have already become entitled in possession or be for the time being actually entitled to the receipt shall or but for this present clause would become wholly or in part vested in or payable to any other person or persons, or if he or she shall contract any marriage forbidden by me as hereinafter expressed, then and in any such case his or her share right title and interest of in and to my said trust estate and the income thereof shall thenceforth cease and determine and my said trust estate shall thenceforth go and be held in such manner as the same would have been held if he or she had died before me without leaving any child or children living at my death. And I declare that the marriages forbidden by me are in the case of son or daughter marriage with a person

of any degree of kindred unless more remote than third cousin, and also in the case of a daughter marriage contracted without the previous written consent of the trustees or trustee for the time being of this my will or if more than two of a majority of them."

The will was made in 1881. In 1886 a daughter (the respondent) married her first cousin. In 1902 the testator died. Upon an originating summons Kekewich J. held that the daughter by her marriage during the testator's life forfeited her share and interest in the trust estate and the income. This decision was reversed by the Court of Appeal (Vaughan Williams and Stirling L.JJ., Cozens-Hardy L.J. dissenting). (1) Hence this appeal by the trustees.

Levett, K.C. (*Iselin* and *W. A. Russell* with him), for the appellants. The provision in the Wills Act that a will is to be construed as if it had been executed immediately before the death of the testator relates only to the property comprised in the will: *Bullock* v. *Bennett*. (2) Primâ facie a will speaks from the time when it is made, unless a contrary intention appears from the will itself, and this will should be construed as if the testator had expressly mentioned marriages during his lifetime. The majority of the Court of Appeal thought that a contrary intention did appear from the special words of the clause, especially the words "part or share," "cease and determine," and the words requiring the consent of the trustees to the marriage of a daughter. But those words shew, not that the testator contemplated only marriages after his death, but that he contemplated them as well as marriages during his lifetime. This testator's intention is clear. He had such an objection to marriages between cousins that he meant to prohibit them whenever they might happen. In the cases where there has been a forfeiture on bankruptcy the Courts have felt so strongly that the testator meant to prevent his property from going to creditors that they have held the clause applicable to bankruptcy during the testator's lifetime even where some words pointed in the other direction: *Metcalfe* v. *Metcalfe* (3); and see *Ancona* v. *Waddell*. (4) The rule which

(1) [1904] 1 Ch. 431.
(2) (1855) 7 D. M. & G. 283.
(3) [1891] 3 Ch. 1.
(4) (1878) 10 Ch. D. 157.

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has been applied to alienation and bankruptcy should be applied to prohibited marriages, especially when the same words are used with regard to each event. The respondent's construction requires the words "after my death" to be inserted after "shall."

Upjohn, K.C., *Edward Clayton*, and *F. H. Schwann*, for the respondent, were not heard.

EARL OF HALSBURY L.C. My Lords, I do not propose to go over this elaborate argument again. It appears to me that the decision of Vaughan Williams and Stirling L.JJ. is perfectly right. There is an intention on the part of the testator, to my mind, overwhelmingly established upon the words of the will itself, and I decline to go beyond that. The argument from words used with reference to bankruptcy seems to me to be disposed of by this consideration. Cases in which there was a desire on the part of the testator that his property which he was dealing with should not go to strangers, but should go to his children, and a plain intention was shewn that the forfeiture clause should apply if the thing happened during his own lifetime, have no reference to the subject-matter with which we are dealing. To my mind the reasoning of Vaughan Williams and Stirling L.JJ. as to the intention of the testator is perfectly satisfactory, and I move your Lordships that the appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion; I agree with the majority of the Court of Appeal. I think in this particular will the marriages forbidden are marriages taking place after the testator's death.

LORD JAMES. My Lords, I concur.

LORD LINDLEY. So do I.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 3, 1905.

Solicitors: *John F. Child; Ward, Perks & McKay.*

[HOUSE OF LORDS.]

OGDENS, LIMITED . . . . . APPELLANTS;

AND

NELSON . . . . . RESPONDENT.

OGDENS, LIMITED . . . . . APPELLANTS;

AND

TELFORD . . . . . RESPONDENT.

H. L. (E.) 1905 *March* 24.

Contract—Construction—Contract for Fixed Period—Express Term—Implied Condition.

Tobacco merchants contracted with a retail dealer that—in consideration of his purchasing direct from them and agreeing to continue to buy, display and sell their goods and not to sign any agreement with any other firm which would prevent him from carrying out this contract—they would for the next four years distribute to such of their customers as purchased direct from them their entire net profits on goods sold in the United Kingdom, and also the sum of 200,000*l.* a year, to be distributed every three months in proportion to the purchases. Soon after the manufacturers sold their business and went into voluntary liquidation:—

Held, that upon the true construction of this particular contract there was an express contract to pay to the retail dealer his due proportion of 200,000*l.* a year for four years, and that he was entitled to damages for the breach of that contract, the merchants having put it out of their own power to carry on the business.

The decision of the Court of Appeal, [1904] 2 K. B. 410, affirmed.

THESE two appeals turned on the same question.

In March, 1902, the appellants, tobacco merchants, made the following offer to retail dealers:—

"Bonus Distribution. Our entire net profits and 200,000*l.* per year for the next four years.

"Commencing April 2nd, 1902, we will, for the next four years, distribute to such of our customers in the United Kingdom as purchase direct from us, our entire net profits on the goods sold by us in the United Kingdom. In addition to the above, we will, commencing April the 2nd, 1902, for the next four years, distribute to such of our customers in

H. L. (E.) 1905 OGDENS, LIMITED v. NELSON. OGDENS, LIMITED v. TELFORD.

the United Kingdom as purchase direct from us the sum of two hundred thousand pounds per year. Distribution of net profits will be made as soon after April 2nd, 1903, and annually thereafter, as the accounts can be audited, and will be in proportion to the purchases made during the year. Distribution as to the two hundred thousand pounds per year will be made every three months, the first distribution to take place as soon after July 2nd, 1902, as accounts can be audited, and will be in proportion to the purchases during the three months' period. To participate in this offer we do not ask you to boycott the goods of any other manufacturer."

In reply the respondent Nelson signed this circular:—"I beg to inform you that I have not signed the agreement with the Imperial Tobacco Company, Limited, dated March, 1902, and in consideration of participating in your bonus distribution of the entire net profits on goods sold by you in the United Kingdom, and two hundred thousand pounds per year for the next four years as set out in your particulars, I hereby agree not to sign it or any similar agreement with the Imperial Tobacco Company, Limited, or any other company or firm containing any conditions which would prevent me from buying, displaying, selling or distributing goods, or the goods of any other manufacturers, and I also undertake to continue to buy, display and sell your goods."

The respondent bought goods directly from the appellants, and in July received his proportion of 50,000*l.*, the quarter of the 200,000*l.* bonus. In September the appellants sold their business to the Imperial Tobacco Company, and in October went into voluntary liquidation. The appellants having sued the respondent for the price of goods sold, the respondent counter-claimed for damages for breach of the contract. Lord Alverstone C.J., who tried the case, entered judgment (1) for the plaintiffs for 58*l.* on the claim, and for the defendant for 70*l.* on the counter-claim. No profits were made by the appellants for the six months ending September, 1902, and Lord Alverstone thought that there was no evidence of a reasonable prospect of profits for distribution, but he held

(1) [1903] 2 K. B. 287.

that the respondent was entitled to compensation for loss of his proportion of the 200,000*l.* a year for four years, and that 70*l.* was a reasonable sum. (1)

That decision was affirmed by the Court of Appeal (Collins M.R., Romer and Mathew L.JJ. (2)).

Asquith, K.C., and *F. E. Smith* (*Rufus Isaacs, K.C.*, and *Hemmerde* with them), for the appellants, contended that there was no express or implied contract to carry on the business or to distribute the 200,000*l.* for four years or for any fixed time.

[They cited *Rhodes* v. *Forwood* (3) and the other cases referred to in the Courts below.]

J. R. Randolph (*Bankes, K.C.*, with him), for the respondent.

EARL OF HALSBURY L.C. My Lords, in this case I am of opinion that the judgment of the Court of Appeal was right and ought to be affirmed. I very much doubt whether in dealing with this contract we can get any light from other cases decided upon other forms of contract. I do not think the question here depends upon how much you can imply. That part of the contract upon which I rely, and on which the Court of Appeal relied, is that which is expressed.

It is clear that offers were made to the retail traders by rival associations in order to, as it was called, capture the tobacco trade. One association, the Imperial, offered for a named period to give them a certain amount of the profits, or a certain percentage of the profits, and to distribute by way of bonus 50,000*l.* Upon which the appellants telegraphed to the customers generally, or at all events to this particular litigant: "Advise you not to sign Imperial agreement. See our circular in the morning." Now the circular in the morning, which forms part of the contract, offers this bonus distribution: "Our entire net profits and 200,000*l.* per year for the next four years." Is it possible to talk about there being no bargain in respect of this matter, and that you are to look

(1) [1903] 2 K. B. 287. (2) [1904] 2 K. B. 410.
(3) (1876) 1 App. Cas. 276.

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to an implication for it? It appears to me that that is a definite offer, and that that distribution is to occupy four years. Then the acceptance seems to me to be equally free from doubt.

The acceptance is prepared for the signature of the intending customer by those who are making the offer; so that it is their own language which they get the customer to sign. Once that bargain is made and the customer signs it, whatever else may happen, there is undoubtedly not an implied but an express contract to distribute for four years during that period annually 200,000*l*. There is no doubt that the meaning of this contract was that it was to last for four years. The customer was entitled to say, "I have given you my signature, and I have thereby enabled you—at all events it is supposed by you that I have thereby enabled you—to continue this strife between you two associations. I have performed my part of this contract; now perform yours." It may be that the customer cannot compel them in law to carry on their business, it may be that he cannot prevent them from selling themselves as they did; but having done it, they are bound to pay the damages which are consequent upon their having put it out of their power to carry on the business, and having failed to perform their contract to pay the respondent a proper proportion of the 200,000*l*. a year for four years, which is all that is now insisted upon by him.

Under these circumstances I construe this document without any reference to other documents. I confess I am very jealous of attempting to interpret one contract by another contract made under different circumstances. I look at this contract alone, and I cannot entertain a doubt that there was a breach of the contract, and I move that this appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion. The circumstances of this case are so remarkable and the project apparently so wild and extravagant that at one time I had some doubt whether this offer was to be construed as a serious business offer or not. But I am now satisfied that it

was intended as a serious offer, and was taken seriously by those who responded to it.

Now I entirely agree with the Lord Chancellor, that cases on the construction of other contracts do not help us at all in this matter; but, looking at this contract, I find an engagement on the part of Ogdens for four years to distribute 200,000*l.* a year amongst those persons who would come forward as customers and deal with them directly. Here is a man who became a customer of Ogdens and was willing to go on dealing with them directly. But then they say, "We cannot deal with you directly because we have put it out of our power." I do not think that was any answer at all. I think the respondent is entitled to bring his action for breach of the contract to pay him his proportion of the 200,000*l.* a year for four years.

LORD JAMES. My Lords, I agree with the opinions just expressed; but I wish to add this. I base my view that the respondent should succeed mainly on the second obligation in the contract. If the case had rested on the first obligation to pay over to the customers the entire net profits on the goods sold by Ogdens for four years, although I think I should have arrived at the same conclusion, I should certainly have had some doubt. But I have no doubt as to the liability of the company to pay to its customers on the second clause, in addition to the entire net profits on the goods sold by Ogdens in the United Kingdom during such period of four years, a bonus of 200,000*l.* per year in each of those four years. In order to avoid that liability it must be contended that into that positive liability there shall be introduced these words—"but which obligation we shall have a right to put an end to whenever we think proper," because if the contention of the appellants is correct that it was put an end to when the business was voluntarily disposed of, it was at their mere will to say whether the 800,000*l.* should be paid or not: Ogdens could at any time have left off paying it if their contention is right. Could it be supposed for a moment that either of the parties to this contract intended that that promise should be a promise merely in words and in form which could be determined at any

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time by the will of one of the parties who thought it right to do so? I cannot come to that conclusion, and therefore I think that this appeal ought to be dismissed.

LORD LINDLEY. My Lords, I am entirely of the same opinion. The counter-claim is based, not upon any implied promise to carry on business for a certain time, but upon an express promise by Ogdens to pay to the defendants a share of 200,000*l.* for four years. What is the answer to that? There is no answer that I can see. The question is, what does the promise mean? To my mind it means what it says. It never was put forward as a practical joke which nobody was to pay attention to—it was a serious business agreement. That being so, I can see no defence to the counter-claim.

[In the second appeal a similar result followed without argument.]

Orders of the Court of Appeal affirmed and both appeals dismissed with costs.

Lords' Journals, March 24, 1905.

Solicitors : *A. Middleton Rickards ; Smith, Rundell & Dods, for A. H. Bullen, Cardiff ; Bell, Brodrick & Gray, for Cousins, Botsford & Phoenix, Cardiff.*

[HOUSE OF LORDS.]

LADY VIOLET WATT . . . . . APPELLANT;

AND

JULIA WATT . . . . . RESPONDENT.

H. L. (E.) 1905 April 3.

Practice—Damages—Verdict for excessive Damages—New Trial—Jurisdiction of Court of Appeal—Order for New Trial unless Damages reduced.

When in an action of tort the jury find a verdict for the plaintiff for a sum which the Court of Appeal considers unreasonable and excessive that Court has no jurisdiction, without the defendant's consent, to order that unless the plaintiff consents to reduce the damages there shall be a new trial.

The opinion of the Court of Appeal on this point in *Belt* v. *Lawes*, (1884) 12 Q. B. D. 356, overruled.

THE respondent brought an action against the appellant for libel which was tried before Gainsford Bruce J. and a special jury. The defendant did not justify; the jury found a verdict for the plaintiff for 5000*l.*, and the learned judge entered judgment for her for that sum. On appeal by the defendant the Court of Appeal (Collins M.R., Mathew and Cozens-Hardy L.JJ.), considering that the damages awarded were excessive and unreasonable, made an order for a new trial unless the plaintiff consented to the damages being reduced to 1500*l.* The plaintiff consented, and the judgment of Gainsford Bruce J. was amended accordingly. Hence this appeal.

1904. Nov. 29; Dec. 1. *Rufus Isaacs, K.C.* (*J. R. Atkin* with him), for the appellant. The Court of Appeal being of opinion that the damages were excessive and unreasonable, so as to amount to a perverse verdict, had no power without the defendants' consent to make an order that unless the plaintiff consented to reduce the damages from 5000*l.* to 1500*l.* there must be a new trial. Such an order is invalid unless both parties consent. None of the practice books in the editions before the Judicature Acts say that there is such a power, and there is nothing in those Acts or the orders and rules made

H. L. (E.) 1905 WATT v. WATT.

under them which gives the power. It is true that in *Belt* v. *Lawes* (1) there were the opinions of three judges of the Court of Appeal (Brett M.R., Baggallay and Lindley L.JJ.) in favour of the power, but the Court refused to reduce the damages or make an order for a new trial, and held that the verdict must stand. Orders like the one now in question have no doubt been made and been submitted to by defendants because it was not worth their while to risk the result of a new trial. But there never has been any decision in favour of the power, and the authorities cited in *Belt* v. *Lawes* (1) are strong against it, especially *Leeson* v. *Smith* (2), where Lord Denman C.J. said: "It is clear that the verdict is at all events for too much; we cannot however reduce the damages without the consent of both parties, and therefore the rule must be made absolute for a new trial"; and Littledale, Taunton, and Patteson JJ. concurred.

[They also contended that evidence was admitted which should have been excluded.]

Lawson Walton, K.C., and *Theobald Mathew*, for the respondent. In a malicious libel the jury may give vindictive or punitive damages; there is not any legal standard of measurement; the jury may award whatever sum they think right. It is not disputed that the Court of Appeal has for a long time made orders like the present. The Court virtually says: If the damages had been 1500*l.* we should not have granted a new trial. Surely that is a reasonable power to be acted on in the exercise of judicial discretion. In the Privy Council a similar order was made in *Fleming* v. *Bank of New Zealand*. (3) The discretion of the Court to grant a new trial where the damages were excessive was long ago established and said to be a judicial, not an arbitrary, discretion: *Wood* v. *Gunston*. (4) And the Court has the power to increase the damages as well as to reduce: Buller's Nisi Prius, 7th ed. 21 a. There is certainly nothing in the Common Law Procedure Act, or the Judicature Acts or orders to reduce or restrict the powers of the Court. Brett M.R. and Lindley L.J. in *Belt* v.

(1) 12 Q. B. D. 356.
(2) (1834) 4 Nev. & M. 304.
(3) [1900] A. C. at p. 587.
(4) (1655) Sty. 466.

Lawes (1) thought it quite clear that there was the power contended for. The present respondent is content with the decision of the Court of Appeal, but if that decision is altered in part, the respondent submits that the whole of it should be reversed and the verdict stand as it was delivered.

[They also referred to *Alcock* v. *Hall* (2) and *Praed* v. *Graham*. (3)]

J. R. Atkin, in reply. No case has been found where it has been decided that the Court has the power in question. The issue of fact should be exclusively determined by a jury, who are the sole judges of damages.

The House took time for consideration.

1905. April 3. EARL OF HALSBURY L.C. My Lords, in this case I think there ought to be a new trial. I say this quite independently of what I have to say hereafter upon the subject of the jurisdiction of the Court to direct the amount of the damages without the consent of both parties to the litigation. I think the trial itself was most unsatisfactory, and the verdict ought not to be permitted to stand.

The learned counsel for the plaintiff in his opening speech read a letter which was written without prejudice, and which was undoubtedly well calculated to influence the jury against the defendant. It is only justice to the learned counsel to say that he was under the impression that it was not written without prejudice—an impression which he retained up to the time of the argument before your Lordships—and he was only undeceived when the letter itself was produced.

It is not necessary to discuss how it could have been evidence against the defendant under any circumstances. It was a letter written by the husband to one of the solicitors in the case, and assumed to be evidence of malice on the part of the defendant because it was a copy in her handwriting. I will only say that I do not assent to its being evidence against her, its only relevancy being to shew malice by her, and simply without

(1) 12 Q. B. D. 356. (2) [1891] 1 Q. B. 444.
(3) (1889) 24 Q. B. D. 53.

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more proof of authorship than that it was in her handwriting and a copy of her husband's letter.

On the other hand, the plaintiff was encountered by a most insulting and offensive cross-examination, for some parts of which there does not seem to be the least justification. (1) Even in mitigation of damages it is well settled you cannot go into evidence which, if proved, would constitute a justification. Nor does it appear to me that it makes any difference that the evidence is offered in cross-examination. See this question discussed in *Watson* v. *Christie* (2); *Speck* v. *Phillips*. (3) Of course, speaking generally, parties take their risk of such a course, and inflame the damages against themselves by such a proceeding; but in extreme cases, such as this is, I think the Courts ought not to allow such an extravagant result, even though the parties have procured it by the conduct of which their representatives have been guilty.

The whole theory of the jurisdiction of the Courts to interfere with the verdict of the constitutional tribunal is that the Court is satisfied that the jury have not really acted reasonably upon the evidence, but have been misled by prejudice or passion; and the conduct to which I have referred was what could not have been prevented by the learned judge, because if an objection had been made to the cross-examination in question the reply would have been that the party here was a witness, and every question to her credit was admissible; but that does not affect the controlling power of the Court if the Court is satisfied that the jury have been misled. I remember a new trial granted because the learned counsel for the plaintiff read to the jury the amount of damages claimed in the declaration.

Under the circumstances I think it is the duty of the Court to interfere and remit the cause to be heard again under circumstances better calculated to secure a reasonable verdict. I do not think it is a case in which your Lordships should follow the precedent of *Cumming* v. *Sibly* (4) or Order XXXIX., r. 7.

(1) The plaintiff was not cross-examined by either of the learned counsel who appeared for Lady Violet Watt in this House.

(2) (1800) 2 B. & P. 225; 5 R. R. 579.

(3) (1839) 5 M. & W. 281; 52 R. R. 723.

(4) (1769) 2 Burr. 2489.

I am, however, further of opinion that the Court has no jurisdiction to fix the amount of damages without the consent of both the parties. This question was raised in *Belt* v. *Lawes* (1), and though it was not necessary for the decision in that case, a weighty opinion was given by my noble and learned friend Lord Lindley, which has made me hesitate before I come to a conclusion opposed to his.

There has been, doubtless, some confusion in discussing the question of damages arising from the mode in which our law has grown up. The Court itself has the right, and has exercised it in various ways when the question has arisen upon demurrer or default. It may send it, as has been commonly the practice, to the sheriff to assess; but it has the right, which has always been asserted, to decide that question for itself—probably because that question is often a question of law, where the damages are fixed by law, and where it was mere matter of law it was established in very early times (10 Hen. 6) that the Court itself could even increase the damages; and so the learned editor of Reeves's History of the Common Law says: "There was always this distinction between trial by jury and mere inquisition or inquiry by a jury to assess damages—that, in the latter case the inquisition was only to inform the mind of the Court and it was at their discretion whether they would award judgment for the amount found by the jury, whereas upon a trial they had no jurisdiction to interfere as to the amount of damages in cases of tort"; but where the jury had found larger damages than were laid in the declaration the Court held they were entitled to restrict them to the amount claimed (2 Hen. 6, c. 7). The Courts, however, adopted the somewhat unconstitutional proceeding of refusing to give the plaintiff judgment unless he would consent to reduce his claim to what ought to be considered reasonable, and hence the practice and the impression that the Court, with the consent of the plaintiff, could reduce the amount of damages.

My Lords, I am unable after a very anxious examination of the earlier authorities to assent to the legality of this proceeding

(1) 12 Q. B. D. 356.

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unless by the assent of both parties. The very indirect method of the proceeding that they would not give the plaintiff judgment shews that they could not do it without the plaintiff's assent; and one can well understand that the defendant was not very likely to refuse his assent to a proceeding intended for his benefit. The theory of all the cases seems to me to be that the right of the Court to interfere with a jury's verdict was only to be by the assent of both parties.

Assume it to be the constitutional view that a person can only have damages assessed against him for a tort, what right has a Court to intervene and say that damages which in its judgment are appropriate shall be the amount assessed against him? The only judgment by a jury is one which the Court itself by the hypothesis says is unreasonable and excessive. Has not the defendant a right to say, "I refuse to have judgment assessed against me by a Court? The law gives me a right to a jury, and how does the fact that a jury have already found a verdict against me, which you decide cannot be allowed to stand because it is unreasonable and excessive, displace my right to have the verdict of a jury upon the question?"

Hesitating, as I do, to differ from the opinion expressed by my noble and learned friend Lord Lindley, I have come to the conclusion that there is no power in the Court to alter the verdict except by ordering a new trial; and for these reasons I move your Lordships that the judgment appealed from be reversed and a new trial had.

LORD DAVEY. My Lords, I agree that this appeal ought to be allowed. It will be sufficient for me to rest my judgment on the second ground stated by the Lord Chancellor. It appears to me an important question of principle. I assume that in an action of tort a defendant against whom a verdict has been found is entitled to have the damages to be paid by him assessed by the jury which has found the verdict. This right was perhaps of greater importance in former days than it is at present, but it is one which has always been recognised, and effect is given to it in the present rules of Court, Order XXXVI., r. 2. If, therefore, the Court takes upon itself

to fix the amount of damages which the defendant is to pay, it is primâ facie usurping the functions of the jury and invading the right of the defendant. The Court, however, has jurisdiction to set aside the verdict of the jury and direct a new trial where it considers the damages given by the jury are excessive or (in certain cases at any rate) inadequate. To quote the words of James L.J., delivering the judgment of the Court in *Phillips* v. *London and South Western Ry. Co.* (1): "The verdicts of juries as to the amount of damages are subject, and must for the sake of justice be subject, to the supervision of a Court of first instance, and, if necessary, of a Court of Appeal, in this way, that is to say, if, in the judgment of the Court, the damages are unreasonably large or unreasonably small, then the Court is bound to send the matter for reconsideration by another jury." But can the Court, when it considers that the damages are disproportionate and excessive, say there shall be no new trial if the plaintiff is willing to accept a verdict for a reduced amount or (in other words), with the consent of the plaintiff, impose upon the defendant without his consent the payment of damages, the amount of which has been fixed by the Court and not by a jury? It was held by the Court of Appeal in *Belt* v. *Lawes* (2) that the Court has this jurisdiction. Lord Esher says: "Where the complaint is only that the damages are excessive and the verdict cannot be otherwise impeached, and it is a case where the plaintiff is entitled to substantial damages, the Court has power to refuse a new trial without the consent of the defendant on the plaintiff's consenting to the amount of the damages being reduced to such an amount as, if it had been given by the jury, the Court would not have considered excessive." The learned judge also expressed the opinion that, in the converse case, where the damages are inadequate, the Court might, without the consent of the plaintiff, refuse a new trial if the defendant were willing to submit to a verdict for an increased amount.

The first observation that occurs to me is that, if the jurisdiction can only be exercised with the consent of one party, it is difficult to understand why that of the other party should

(1) (1879) 5 Q. B. D. 78, at p. 85. (2) 12 Q. B. D. 356.

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not be equally necessary. I do not doubt that such orders have been frequently made, but they have not been challenged, and in the vast majority of cases the defendant is well advised to submit to a verdict for the reduced amount rather than incur the risk and expense of a new trial. Nor do I doubt that the power (if it exists) would be convenient, and in most cases do substantial justice and save expense. It is said that the power to grant a new trial is a discretionary power. So it is; but it is a judicial discretion to be exercised in accordance with settled principles of law. The Court, no doubt, is not bound to exercise the power on the ground of some technical misdirection or wrong admission or rejection of evidence if the Court can see that the result was not affected by it, and substantial justice has been done. And the Court may impose terms as to costs and other matters within its jurisdiction.

No authority for the proposition laid down in *Belt* v. *Lawes* (1) is quoted by the learned judges in that case, and no authority earlier than that case was brought to our attention by Mr. Mathew in his very careful argument. On the other hand, there are numerous dicta of learned judges to the contrary. The express words of James L.J., delivering the judgment of the Court in *Phillip's Case* (2), which I have already quoted, may perhaps be explained by saying that this point was not present to the learned judge's mind. But in *Leeson* v. *Smith* (3) Lord Denman said: "It is clear that the verdict is at all events for too much. We cannot, however, reduce the damages without the consent of both parties, and therefore the rule must be made absolute for a new trial"; and in *Price* v. *Severn* (4) Alderson J. said: "But nothing is more usual than in cases of assault where an excessive verdict has been given, to suggest to the counsel to agree on a sum to prevent the necessity of a new trial."

In the present case the jury gave the plaintiff a verdict for 5000*l.*, which has been reduced by the Court of Appeal to 1500*l.* The appellant succeeded in convincing the Court that the amount of damages given by the jury was excessive and

(1) 12 Q. B. D. 356.
(2) 5 Q. B. D. 78, at p. 85.
(3) 4 Nev. & M. 306.
(4) 7 Bing. 316, at p. 320.

that the verdict could not be allowed to stand; but she has not been heard on the question whether the reduced amount was not also excessive. What was she to do? Could she appeal from the order on the merits? It would be difficult to convince the appellate tribunal that the reduced amount was outrageous when three experienced judges had suggested it as fair.

I am quite aware that I am differing from learned judges more conversant with cases of this kind than I am. But having with all the caution imposed upon me by that knowledge come to the conclusion that the order of the Court of Appeal is contrary to principle, and unsupported by any reported authority except *Belt* v. *Lawes* (1), I am of opinion the appeal should be allowed.

LORD ROBERTSON (read by Lord Davey). My Lords, I agree in thinking that this appeal ought to be allowed and a new trial ordered, on the ground that the Court of Appeal had no power, without the consent of the defendant, to give decree for any sum of damages other than that fixed by the jury. It appears that there has been a certain amount of practice in accordance with the course complained of. But I do not find any reasoned vindication of this practice; and, now that the matter is probed, the thing is on principle indefensible.

Order of the Court of Appeal reversed and a new trial ordered: both parties to bear their own costs here and below: cause remitted to the King's Bench Division.

Lords' Journals, April 3, 1905.

Solicitors: *Michael Abrahams, Sons & Co.; Charles Russell & Co.*

(1) 12 Q. B. D. 356.

[HOUSE OF LORDS.]

H. L. (Sc.) 1905 March 6.

GRIMOND (OR MACINTYRE) AND OTHERS APPELLANTS;

AND

GRIMOND AND ANOTHER . . . . . RESPONDENTS.

Will—Trust Disposition and Settlement—Uncertainty—"Charitable or Religious Institutions and Societies."

A testator directed his trustees to divide a portion of the residue of his estate to and among such "charitable or religious institutions and societies" as they might select :—

Held, reversing the decision of the Second Division of the Court of Session, that the bequest was void for uncertainty.

APPEAL from a decision of the Second Division of the Court of Session, Scotland. (1)

The appellants, Mrs. Margaret I. Grimond (or Macintyre) and others, were the next of kin of Alexander Dick Grimond, the testator, and they brought this action against the testator's trustees, the respondents, for declarator that the following direction in the testator's trust disposition and settlement (or will), referring to one-third of the residue of his estate, was void on the ground of uncertainty, and that the share of residue fell into intestacy. The respondents were the trustees and another.

The testator died on January 29, 1903, and by his will dated 1894 directed his trustees to divide the residue of his estate into three equal parts. With regard to one of these parts he provided as follows: "And with regard to one of the said parts or shares they shall divide, pay, and convey the same to and among such charitable or religious institutions and societies as I may direct, and in such proportion to each or any as I may fix by any writing, whether holograph or tested, or under my hand, and failing thereof in whole or in part, then as regards such whole or such part not disposed of by me to and among such charitable or religious institutions and societies as my trustees or their survivors or survivor of them may select, and in such proportions to each or any as they may fix." The testator did

(1) (1904) 6 F. 285.

not leave any writings in regard to the charities, institutions, or societies he desired to benefit.

On October 31, 1903, the Lord Ordinary (Lord Low) held the bequest good, and the Second Division, on January 15, 1904 (Lord Moncreiff dissenting), affirmed the Lord Ordinary's interlocutor.

March 6. *Scott Dickson, L.A.* (with him *John Wilson, K.C.*, and *J. Duncan Millar*), (all of the Scottish Bar), for the appellants. The decision of the Court of Session was erroneous. The words "charitable or religious institutions and societies" shewed that the bequest was alternative. It followed that the trustees if they saw fit might ignore charitable purposes altogether, and apply the whole fund to religious institutions and societies, Christian or non-Christian. Such could not have been the intention of the testator. A bequest to religious institutions simply, without indication of locality or particular description of any kind, is not a good bequest by the law of Scotland. In fact, to hold this bequest good would practically leave it to the trustees to make a will for the testator. All the cases were considered in *Blair* v. *Duncan.* (1) [He also referred to *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (2), *Macduff* v. *Macduff* (3), *White* v. *White* (4), *Cocks* v. *Manners* (5), and Tudor's Charities, 3rd ed. p. 9.]

W. Campbell, K.C. (with him *W. J. Cullen*), (both of the Scottish Bar), for the respondents. It is settled by the law of Scotland that a testator may make a valid bequest of his estate in the form of a direction to trustees to bestow it at their discretion on purposes or objects to be selected by them from a class pointed out: see *Crichton* v. *Grierson* (6), Lord Lyndhurst; *Murray* v. *Fleeming* (7); *Trustees of John Brown* v. *His Relations* (8); *Snodgrass* v. *Buchanan* (9); *Hill* v. *Burns* (10); *Playfair's Trustees* v. *Playfair* (11); *Miller* v. *Black's Trustees.* (12)

(1) [1902] A. C. 37.
(2) [1891] A. C. 531.
(3) [1896] 2 Ch. 451.
(4) [1893] 2 Ch. 41.
(5) (1871) L. R. 12 Eq. 574.
(6) (1828) 3 W. & S. 329, 339.
(7) (1729) Mor. Dict. 4075.
(8) (1762) Mor. Dict. 2318.
(9) (1806) Mor. Dict. Ap. Ser. Heirs, 1.
(10) (1826) 2 W. & S. 80.
(11) (1900) 2 F. 686.
(12) (1837) 2 Sh. & M'L. 866.

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Here there could not be any doubt as to what the testator intended by the words "religious institutions and societies." He must be taken to have meant institutions and societies each professing some form of religion. Further, the validity of bequests similar to this has been assumed in Scottish law: *Cobb* v. *Cobb's Trustees* (1); *Town Council of St. Andrews* v. *Wemyss* (2); *Robbie's Judicial Factor* v. *Macrae* (3); *Andrews* v. *M'Guffog* (4); *Ferguson* v. *Marjoribanks*. (5) The word "or" here might well be taken in an explanatory character as amplifying the word "charitable," and not as a disjunctive.

EARL OF HALSBURY L.C. My Lords, I do not think it is necessary to go through the course of the authorities. I think this question may be decided upon a very simple proposition. In my opinion the testator here has not given a class from which he allowed his trustees to select individually, but he has left his directions so vague that it is in effect giving some one else power to make a will for him instead of making a will for himself, which I conceive to be the objection always entertained where the directions are so extremely vague that you cannot say what it is that the testator meant. In this case the testator has not made any will himself; he has allowed some one else to make a will for him after his death, and that the law will not allow.

My Lords, I confess I have not been able to entertain much doubt from the commencement of this argument that that is the condition of this will, and I think I am encouraged in the expression of that opinion by finding some variety of opinion among the learned judges themselves, who nevertheless adhered to the decision of the Lord Ordinary. The Lord Ordinary says it is to be confined to religious societies in the sense of those that are Christian. I do not find that that view is adopted by any of the learned judges on appeal, and what the particular limit is within which the persons designated, the trustees, are to select I am afraid I have not been able to discover.

(1) (1894) 21 R. 638.
(2) (1845) 17 Sco. J. 583.
(3) (1893) 20 R. 358.
(4) (1886) 11 App. Cas. 313.
(5) (1853) 15 D. 637.

It seems to me that the judgment of Lord Moncreiff really disposes of the question quite satisfactorily. I do not wish to add anything to his Lordship's view. It appears to me that he has satisfactorily answered the whole argument which has now been presented by the respondents. In the result I move your Lordships that the judgment appealed from be reversed, and a proper interlocutor made for the purpose of giving effect to the judgment prayed by the pursuers.

LORD MACNAGHTEN. My Lords, I concur.

LORD JAMES. My Lords, I concur for the reasons which have been given by Lord Moncreiff in his judgment.

LORD ROBERTSON. So do I.

Scott Dickson, L.A. Will your Lordships allow me to say that while the costs below are disposed of we ask for the costs of the appeal to be taken out of the third which has been in dispute.

EARL OF HALSBURY L.C. Yes. I think the testator himself was to blame for this.

Ordered, that the interlocutors, so far as appealed against, be reversed, and that the costs of this appeal be paid out of the one-third share of the residue of the testator's estate.

Lords' Journals, March 6, 1905.

Agents for appellants: *A. & W. Beveridge, for Duncan & Black, W.S., Edinburgh.*

Agent for respondents: *John Kennedy, W.S., for W. & J. Cook, W.S., Edinburgh.*

[PRIVY COUNCIL.]

J. C.*
1904
Dec. 16, 17.
1905
Feb. 8.

THE UNITED STATES OF AMERICA . APPELLANTS;

AND

GAYNOR AND ANOTHER . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA.

Extradition—Arrest and remand of Accused—Writs of Habeas Corpus—Jurisdiction—Procedure.

The respondents having been arrested in Montreal by order of the Extradition Commissioner for an alleged extradition offence in the State of Georgia, were remanded by him for the purpose of affording the prosecution an opportunity of proving its case. Thereafter one judge in Quebec issued on their application and then quashed writs of habeas corpus, while another judge afterwards issued similar writs and discharged the respondents from custody on the ground that no extradition offence had been disclosed against them in the proceedings before him:—

Held, that this was the question which the Extradition Commissioner had jurisdiction to investigate on the remand which he had ordered, that his remand warrant could not be treated as a nullity, that the respondents were in lawful custody, and that in consequence the judge had no jurisdiction to order their release.

APPEAL by special leave from a judgment of Caron J. (Aug. 13, 1902) dismissing motions made on behalf of the appellants to quash writs of habeas corpus granted to the respondents and ordering their liberation.

Indictments had been filed in 1899 against the respondents and others in the State of Georgia charging a conspiracy in 1897 to defraud the United States Government. They did not appear, but took up their residence in Quebec, whereupon the appellants applied for their extradition. On May 4, 1902, they laid an information and complaint before Mr. Ulric Lafontaine, an Extradition Commissioner sitting at Montreal and appointed under the Extradition Act (R. S. C. c. 142), s. 5, who ordered their arrest and subsequently their detention in Montreal. The warrants issued by him charged participation in fraud in

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD ROBERTSON, LORD LINDLEY, SIR FORD NORTH, and SIR ARTHUR WILSON.

obtaining money by false pretences, in embezzlement, and in theft. From thence they were brought on May 26, and produced under writs of habeas corpus before Andrews J., who had issued them. On June 21 Andrews J. ordered the sheriff to convey them to the common gaol of the district of Montreal, and to deliver them into the custody of the keeper of the said gaol, who was thereby directed to keep them safely until duly discharged in due course of law from custody under the warrant granted in Montreal for their arrest and detention.

The respondents having been delivered into the custody of the keeper of the gaol at Montreal obtained from Caron J. the writs of habeas corpus the subject of appeal, and they were by order of Caron J. handed over to the sheriff of Quebec. The appellants thereupon moved to quash these writs.

Caron J. in his judgment, after reviewing the facts and describing the arrest of the respondents as a transaction which "in its aim and execution was utterly indefensible," first dealt with the objection raised on behalf of the appellants that the matter was res judicata, having regard to the fact that the writs, the subject of the motion under consideration, were similar to those issued by Andrews J. and dismissed by him. On this point he stated that, in his view, the judgment of Andrews J. was not a decision upon the merits of the case, but only an order that the respondents be sent back to Montreal. He held also that there were new allegations of fact, which had not been adjudicated upon by Andrews J., included in the petitions presented to him, and that on the authorities he had jurisdiction in the matter, and dismissed the motion. He did so on the ground that the warrant under which they were detained was invalid as not containing any date of the offence therein alleged to have been committed. According to the general rules of pleading in criminal matters it ought to have specified the date, and in this case especially, as it did not appear on the face of the warrant that the offence alleged therein had been committed prior to the extradition convention of 1889. He also considered that according to the record of the proceedings in the United States the real offence of which the respondents were accused was that of

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" conspiracy to defraud," which offence is not included in any convention between the two Governments.

Sir E. Clarke, K.C., McMaster, K.C., and *E. Percival Clarke*, for the appellants, contended that this judgment should be reversed. The information and complaint which they had made before Mr. Lafontaine, and the warrant issued by him, disclosed extradition crimes imputed to the respondents in the United States. Mr. Lafontaine had accepted and partially exercised jurisdiction over the case. He had begun to inquire into it and examine witnesses, and had remanded his prisoners to the Montreal gaol. It was his province, therefore, to complete the investigation and decide whether the prisoners should be discharged or extradited. It could not be disputed that Mr. Lafontaine had all the necessary powers and jurisdiction. It was incompetent for any other judge, whether Andrews J. or Caron J., to interfere with him and take the exercise of his jurisdiction out of his hands. The transfer of the prisoners from Montreal to Quebec by order of Andrews J. was mistaken; the most that could be done legally and regularly was to ascertain if the custody was lawful, and here the custody was under remand pending investigation of the case by a judge having jurisdiction. Even if writs of habeas corpus could under the circumstances be legally issued, the returns to Caron J.'s writs shewed not merely a legal cause of detention, but a remand by Andrews J., who had quashed his own writs on the ground of a legal right to detain. Caron J., on the other hand, while dealing with a mere matter of habeas corpus, and without any motion to discharge the prisoners, and before hearing evidence and argument to the effect that the charges made were extradition crimes, disposed of the case on its merits and discharged the prisoners. He thereby usurped Mr. Lafontaine's jurisdiction and exceeded his own. It was contended that this was illegal, and so completely without jurisdiction that if he had ordered extradition instead of discharge the prisoners would have been entitled to discharge under s. 12 of the Extradition Act, as having been extradited without jurisdiction. On the merits Caron J. was in error.

Mr. Lafontaine's warrant was in all respects sufficient, and in the form prescribed by the Extradition Act. The offences disclosed were extradition crimes, and under art. 3 of the convention of 1889 the prisoners could only be tried for extradition offences. It was, however, immaterial whether the United States intended to try him for some other offence: *Cox* v. *Hakes*. (1) Canadian extradition law is the same as English law, and until 1860 the habeas corpus law in Quebec was also the same. The Quebec Act, 23 Vict. c. 57, made two important alterations—(1.) restricting the right to apply for a writ; (2.) defining to what Court to apply, if there was no judge within the district where the applicant is confined: see ss. 27 and 28, which have been re-enacted as ss. 27 and 28 of c. 95 of Canad. Stat. of Lower Canada. With regard to the procedure in extradition, see the Extradition Act (R. S. C. c. 142), ss. 5, 7, 9, 12, 24; and see also art. 577 of the Canadian Criminal Code (1892). The warrant here was similar to that in *Ex parte Terraz*. (2) See also, as regard date and particularity being necessary, and as to the avoidance of irregularity, *Reg.* v. *Hughes* (3); *Rex* v. *Despard* (4); *Ex parte Piot* (5); *In re Bellencontre* (6); *Rex* v. *Jacobi & Hiller* (7); *Ex parte Krans* (8); *Reg.* v. *Weil*. (9) The prisoner being in custody, whether legally arrested or not, is liable to be prosecuted for any offence which the facts may support: see *In re Tivnan* (10); *McGuiness* v. *Dafoe* (11); *Ex parte Worms* (12); *Re Martin*. (13) As to Mr. Lafontaine's exclusive jurisdiction, see *Rex* v. *Sainsbury* (14); *Reg.* v. *Macrae* (15); *In re Fasset* (16); *Horner* v. *United States* (17); *Terlinden* v. *Ames*. (18) The offences

(1) (1890) 15 App. Cas. 506.
(2) (1878) 4 Ex. D. 63.
(3) (1879) 4 Q. B. D. 614, 622.
(4) (1798) 7 T. R. 736; 4 R. R. 563.
(5) (1883) 15 Cox C. C. 208.
(6) [1891] 2 Q. B. 122.
(7) (1881) 46 L. T. 595.
(8) (1823) 1 B. & C. 258; 25 R. R. 389.
(9) (1882) 9 Q. B. D. 701.
(10) (1864) 5 B. & S. 645; S. C. 9 Cox C. C. 532.
(11) (1896) 3 Can. Cr. Ca. 139.
(12) (1876) 22 L. C. Jur. 109.
(13) (1868) 4 Upper Can. L. J. (N.S.) 198.
(14) (1791) 4 T. R. 451; 2 R. R. 433.
(15) (1899) 2 Can. Cr. Ca. 49.
(16) (1892) 142 U. S. 479.
(17) (1892) 143 U. S. 207, and see also 570.
(18) (1902) 184 U. S. 270.

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disclosed in this case were extraditable and punishable by the laws of both countries: see Canadian Criminal Code (1892), arts. 61, 135, 319. The main charge is embezzlement, which is punishable by the law of the United States: see Revised Statutes, s. 5488.

Asquith, K.C., *Avory, K.C.*, *L. A. Taschereau, K.C.*, and *Matthews*, for the respondents, contended that this appeal was only of academic interest, since the respondents having been in full possession of their liberty since August 13, 1902, no practical effect could now be given to a judgment reversing that appealed from. The two points are: Was this an attempt to obtain extradition where there had been no extraditable offence committed, and had Caron J. jurisdiction to act as he did? In reference to the first, "conspiracy to defraud" is not a crime included in any existing treaty or convention between the United Kingdom and the United States. The following offences first became "extradition crimes" as between those countries by virtue of the following conventions: "Embezzlement, larceny," by art. 1 (3) of the convention of July 12, 1889; "obtaining money, valuable securities, or other property by false pretences," by art. 1 of the convention of December 13, 1900. By art. 8 of the convention of July 12, 1889, with which the convention of December 13, 1900, is incorporated, it is provided that the first-mentioned convention should not apply to any of the crimes therein specified which should have been committed, or to any conviction which should have been pronounced prior to the date upon which the said convention should come into force. Consequently the offence or offences charged were not included in the extradition treaties in force between the two countries at the time of their alleged commission. In reference to the second point, it was contended that Caron J. had jurisdiction to issue the writs sought to be quashed, and to order the release of the respondents thereunder. The proceedings before Andrews J. did not make the matter in issue res judicata or bring it within s. 28 of the Habeas Corpus Act. He did not "refuse" the writ within the meaning of that section. The respondents had withdrawn the proceedings before Andrews J., and they had been delivered back to the

gaoler at Montreal. His judgment had been entirely executed, and he had ceased to have control over or possession of the prisoners. They relied on Consolidated Statutes of Lower Canada, c. 95, s. 1, which enacts that "all persons committed or detained in any prison within Lower Canada for any criminal or supposed criminal offence shall of right be entitled to demand and obtain from the Court of Queen's Bench or from the Superior Court, or any of the judges of either of the said Courts, a writ of habeas corpus"; and on s. 18, which says "any prisoner may ask for and obtain his writ of habeas corpus out of the Court of Queen's Bench or the Superior Court, as hereinbefore provided, before any judge of the said Court of Queen's Bench or Superior Court, in vacation as well as in term," and that he may recover a penalty from the judge if he refuses the same upon view of a copy of the warrant of commitment or detainer, or upon oath made that such copy was denied.

The appellants, moreover, might have brought an extradition charge the next day. With regard to the legality of Mr. Lafontaine's warrant, see the Extradition Act, s. 6, which seems to require that a charge must have been made and warrant of arrest issued in the country demanding extradition. The judge must have power to investigate whether the magistrate has acted within his jurisdiction and whether the offence is extraditable. The judge came to the conclusion that the arrest was an illegal transaction, and that the respondents were unlawfully in custody, and he was acting within his jurisdiction in ordering their release.

Sir E. Clarke, K.C., replied.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. This is an appeal from judgments of Caron J., one of the judges of the Superior Court for Lower Canada, dated August 13, 1902, dismissing motions made on behalf of the United States of America, on July 9, 1902, to quash writs of habeas corpus granted by the said learned judge to the respondents on June 21, 1902, and ordering their liberation. The facts, which are not really in dispute, appear

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to be that the two respondents, Gaynor and Greene, had been in the employment of the Government of the United States of America, and have been charged with certain criminal offences in respect of certain transactions in the State of Georgia. While they were in Quebec application was made to an officer called an Extradition Commissioner for their arrest in pursuance of the international extradition arrangements between Canada and the United States of America.

The application was made upon an information which (among other things) alleged that the respondents had been guilty of theft, and the Commissioner, Mr. Ulric Lafontaine, duly issued his warrant for the arrest of the alleged criminals. They were accordingly arrested, and upon their arrest they applied to a learned judge, Andrews J., for a writ of habeas corpus.

Now the only question which the learned judge had to determine was whether the accused were at the time of the issue of the writ in question in lawful custody. If they were, he had no jurisdiction to release them, but was bound to remand them to custody; and up to this point it is difficult to see what ground could be even suggested for their release.

The offence of theft was an offence which made the offender liable to extradition.

The Commissioner was invested by the Extradition Act (1) with all the powers of a judge in that behalf, and under the Commissioner's warrant the officer having the custody of the accused was to receive and keep them till a particular date (May 27, 1902), and then bring them before the Commissioner to be further dealt with according to law.

It is difficult to understand what is the supposed unlawfulness of the custody, and it is only upon the supposed unlawfulness of the custody that any application for discharge could be founded.

It was probably owing to some mistake as to the jurisdiction of the Commissioner that any writ was issued. At all events, when the facts were placed before Andrews J., and the prisoners were brought before him under his order, the

(1) Revised Stat. Can. c. 142.

learned judge did what was obviously right. He remanded them to their lawful custody, from which they never ought to have been removed, and expressed himself thus :—

"I consider that I am in possession of these accused in virtue of my order, having taken them from the gaoler in the district of Montreal, in whose lawful custody I now return them. I consider I have no right whatsoever to do anything which might in the most remote degree defeat the obligation under which I feel I am, and I may say and I do say that I feel the province is under, that these men should go back to the place from which I took them. If I took them by mistake from there, if I took them without jurisdiction, that is no reason why they should escape here, and it seems to me that it was not for the persons who induced me to commit this act to now endeavour to avail themselves of it in order to effect their escape. I consider it my duty to say this, and I now say that, sitting as a judge having issued a writ of habeas corpus, I do not recognise, but I distinctly deny, the right of any other judge to interfere in the matter until the men have passed from my hands. When I have given my order in the premises I have washed my hands of responsibility in the matter, and then, and not till then, it is my firm conviction that no other judge has the power to interfere with them.

"I say this, of course, not because I desire to say it in respect of any other judge, but I think I am bound to say it to the sheriff who is now present.

"So that there may be no mistake in the matter, I have drawn up my judgment in writing, and it is this :—

"I, the undersigned judge, having heard the petitioner by his counsel, he, the said petitioner, being now present before me, in the custody of the sheriff of this district, also present before me, I do hereby order the said sheriff forthwith to convey the said petitioner, John Francis Gaynor, to the common gaol of the district of Montreal, and there to deliver the said John Francis Gaynor into the custody of the keeper of the said common gaol in Montreal, who is hereby ordered to receive the said John Francis Gaynor into his custody, and to safely keep him until duly discharged in due course of law, according to the

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terms and exigencies of the warrant under which the said gaoler has returned on the writ of habeas corpus to him directed by me, that he detains him, to wit: the warrant under the hand and seal of Ulric Lafontaine, Esquire, Extradition Commissioner, issued and dated at the said city of Montreal, on the nineteenth day of May, in the second year of His Majesty's reign, and in the year of Our Lord one thousand nine hundred and two.

"Thus adjudged and ordered by me at the city of Quebec, the twenty-first day of June, in the said year one thousand nine hundred and two.

"Frederick W. Andrews,

"Judge Superior Court, Quebec."

Their Lordships are of opinion that Andrews J. was quite accurate in what he then did. There had been a regular and proper application to the Extradition Commissioner, who, after receiving evidence to identify the persons charged, had appointed a day for the regular procedure in extradition, and had in the meantime committed the accused to the proper custody by way of remand.

Andrews J. was apparently not informed of this, and he issued the writ of habeas corpus, but (as will be pointed out hereafter) the writ if issued could have no other return than that the cause of detention was a lawful remand by a Commissioner having jurisdiction over the subject-matter of the inquiry.

When the learned judge found out the mistake that had been made, he at once proceeded to put it right, and then the somewhat extraordinary intervention of Caron J. took place which has given rise to this appeal. Notwithstanding the judgment of Andrews J. before him, who had justly pointed out that the matter stood for adjudication before him, the learned judge issued a writ of habeas corpus returnable before himself, and ultimately discharged the accused from custody upon grounds which their Lordships have some difficulty in following.

Caron J. first gets rid of the adjudication by Andrews J. by a singular misapprehension of that learned judge's language. Andrews J. undoubtedly did decide the question before him,

which was whether Mr. Commissioner Lafontaine's order shewed a sufficient cause of detention, and he decided that it did.

Andrews J. gave his reasons, and these Caron J. confuses with the adjudication. The adjudication was (*a*) the determination that the imprisonment was lawful and (*b*) the indorsement on the writs that they were quashed. That is, in point of law, the judgment, and though it is common enough to speak of a learned judge's judgment in referring to the reasons by which that judgment is supported, it is somewhat singular to find a learned judge himself confusing the two things.

The substance of Caron J.'s determination appears to have been that no offence within the meaning of the Extradition Act was shewn upon the document that had been brought before him by a writ of certiorari. Their Lordships are wholly unable to agree with him. There was an accusation of theft, which is an offence in both countries; but the learned judge does not appear to have apprehended that an accusation, on information, of theft was enough for the claim to arrest and detain. Whether the accusation was well founded, or whether there was enough to justify the Extradition Commissioner in committing for surrender, was a question which would have been regularly brought before him and determined at the proper time if the due course of justice had not been interfered with by the interposition of the learned judge. The learned judge accurately points out that a conspiracy is not an offence within the treaty, and because an indictment for conspiracy has been framed in which acts of larceny are charged as overt acts of the conspiracy, the learned judge seems to think that the United States Government are estopped from treating them as distinct and independent acts of larceny. The whole matter, and inter alia how much evidence there was of larceny, would have been duly and properly investigated if the case had been allowed to take its proper course. Their Lordships do not mean to suggest that the writ of habeas corpus is not applicable when there is a preliminary proceeding. Each case must depend upon its own merits. But where a prisoner is brought before a competent tribunal, and is charged with an

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extradition offence and remanded for the express purpose of affording the prosecution the opportunity of bringing forward the evidence by which that accusation is to be supported; if, in such a case, upon a writ of habeas corpus, a learned judge treats the remand warrant as a nullity, and proceeds to adjudicate upon the case as though the whole evidence were before him, it would paralyze the administration of justice and render it impossible for the proceedings in extradition to be effective.

The proceedings are very simple: information and arrest; then—either at once or on remand—the judge investigates the case, and either discharges or makes up his mind to commit for extradition, and, if he does the latter, he has to inform the accused person that he will not be surrendered for fifteen days, in order to afford him an opportunity of bringing the legality of his surrender before a Court of justice.

The same facts and the same observations apply to the case of the other respondent, Greene.

Their Lordships will accordingly humbly advise His Majesty that the two judgments of Caron J. of August 13, 1902, ought to be reversed.

The respondents must pay the costs of this appeal.

Solicitors for appellants: *Norton, Rose, Norton & Co.*
Solicitors for respondents: *Charles Russell & Co.*

[PRIVY COUNCIL.]

TATI CONCESSIONS, LIMITED . . . DEFENDANTS;

AND

HEPPLE . . . . . PLAINTIFF.

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Nov. 25, 29.
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Feb. 8.

ON APPEAL FROM THE COURT OF THE RESIDENT COMMISSIONER FOR THE BECHUANALAND PROTECTORATE.

Law of Bechuanaland—Mining Rights—Rules and Regulations of the Appellant Company—Forfeiture of Block of Mining Claims—Certificate of Preliminary Registration.

Although the mining rules and regulations of the appellant company, which were the contractual terms of the respondent's holding of a block of reef claims within their concession, do not in express terms prescribe or authorize forfeiture, yet the holder's liability thereto is the only sanction of all reservations, whether of rent or otherwise, in the appellants' favour.

A certificate granted thereunder of preliminary registration of the respondents' holding is not equivalent to a lease. The mining rights and privileges conferred by it do not fall under any head or category known to the Roman-Dutch law. The rights of the parties are governed by the terms of their contract, that is, the mining rules and regulations.

In an action for restitution of a mining block, *held* that the appellants were under their rules and regulations entitled to declare it forfeited for non-payment of rent.

APPEAL from a judgment of the Resident Commissioner of the Bechuanaland Protectorate (April 2, 1903) at Mafeking affirming a judgment of the Assistant Commissioner in the Northern Protectorate of Bechuanaland (Feb. 6, 1903).

The action was brought by the respondent to establish his right of title to certain mining claims known as the "Little Eva Block," situate in the said Northern Protectorate, of which he alleged that he had been wrongfully dispossessed by the appellants. He claimed an order directing the appellants to restore to him the title and possession of the same, or in the alternative damages. The plea of the appellants was that the title to and possession of the said claims were acquired by the

* *Present:* LORD MACNAGHTEN, LORD LINDLEY, and SIR ARTHUR WILSON.

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respondent subject to certain mining rules and regulations of the appellant company under which in certain events, one of which was the failure to pay on the due dates monthly rent for the said claims, the title and possession of the respondent became subject to forfeiture by the appellants, and that, the rent being in fact unpaid for the months of May and June, 1902, the appellants had duly and legally forfeited the respondent's right and title to the said claims. The appellants made a counter-claim against the respondent for the sum of 70*l.* 8*s.* 2*d.* for the price of goods sold and delivered.

The appellants were the concessionaires of the Tati district, and as such had vested in them the sole and exclusive ownership of all minerals and mineral rights, and were in the habit of granting licences to work the same to individuals upon the terms contained in certain mining rules and regulations made in the year 1900.

The respondent on December 18, 1899, obtained under the said rules and regulations a prospector's licence in the Tati district; and on April 21, 1902, a certificate of preliminary registration in respect of the reef in suit. He failed to pay in advance the rent due for May and June, and the appellants declared a forfeiture, and ejected the respondent. The Assistant Commissioner decreed restitution with 250*l.* damages or 1800*l.* damages. He held that the rules and regulations did not give the appellants a power to forfeit. The Resident Commissioner affirmed this judgment, reducing the 1800*l.* to 1500*l.*

Gore-Browne, K.C., and *Mackarness*, for the appellants, contended that, according to the true construction of the mining rules and regulations, which formed the basis of the contract between the appellants and respondent, and by which the respondent had given a signed undertaking to be bound, the appellants were entitled, on the respondent's breach of those rules, to forfeit the mining claim in suit. He was bound to pay rent in advance and had not done so, and by the law prevailing in Bechuanaland on this matter, that is by the mining rules, he had incurred a forfeiture. Mining rights were rights sui generis, and the law relating to leases of land was

inapplicable to them. Reference was made to *Thomas* v. *Kerr* (1); *White* v. *Adams* (2); *Johns* v. *Colonial Government* (3); *Neeb* v. *Registrar, &c.* (4); *Lawley* v. *Vandyk*. (5)

Gordon, for the respondent, contended that the right to forfeit was not established. Although mining rents are theoretically due and payable on the first day of every month, the appellants have never in practice insisted on punctual payment, but have debited them in their books and acquiesced in the delay, the amounts being very small. Under the regulations (see clause 50) the respondent was entitled to remain in possession and to continue to work the claims until the resident general manager served a notice upon him to stop work. No such notice had been served, at all events in time, and it was an essential preliminary to a declaration of forfeiture. There had been a tender of payment of rent due, and it was wrongfully refused. There had been a waiver of the right (if any) to forfeit, for they had claimed rent after it was overdue, and had impliedly agreed to a renewal of the tenancy for a term which had not expired at the date of ejection. The rules and regulations do not in express terms authorize forfeiture except of the prospecting licence, which had come to an end. Further, the certificate of preliminary registration is in effect a mining lease, by virtue of which the respondent was liable to pay rent, and the appellants under the regulations (see No. 75) had a preferential charge on the land comprised in his claims and all the rights of a landlord, and particularly the rights of distress and re-entry. Under the law in force in the Protectorate, the Roman-Dutch law, this right of re-entry does not arise until rent is in arrear for two years, and can only be enforced by judgment of a competent Court. He referred to *Johns* v. *Colonial Government* (3), cited on the other side, *Claridge* v. *Kellaway* (6), and *Victor* v. *Curlois*. (7)

Gore-Browne, K.C., replied.

(1) (1903) 13 Cape Times Rep. 526.
(2) (1897) 7 Cape Times Rep. 161.
(3) (1898) 15 Cape of Good Hope Rep. 245, 249.
(4) (1902) 2 Transvaal L. C. 65.
(5) (1888) 2 Kotzé Sup. Ct. of S. A. Republic, 246.
(6) (1891) 8 Cape of Good Hope Sup. Ct. Rep. 140.
(7) (1835) 2 Menz. 79.

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1905. Feb. 8. The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The Tati Concessions, Limited, an English company limited by shares, having its registered office in London, holds under Government a concession of the district of the Tati lying within the Bechuanaland Protectorate.

On April 21, 1902, the respondent Hepple, under and in accordance with the published rules and regulations of the company, applied for and obtained a certificate of preliminary registration in respect of a "block" of ten contiguous reef claims of the prescribed dimensions situated in a mining "location" or "defined area of ground" within the district of the Tati and now known as "Little Eva."

Under and subject to the rules and regulations of the company every holder of a block of reef claims possesses, together with certain other privileges, the exclusive right of mining all reefs comprised within the area of such block vertically downwards. There is no difference between the rights conferred by preliminary registration and those acquired by complete registration. The distinction between the two forms of registration is that preliminary registration is only good for a year. Before the expiration of the year application must be made for complete registration, which is granted on payment of the prescribed fees, after survey by the company's surveyors.

Hepple's certificate of April 21, 1902, was in the prescribed form scheduled to the company's rules and regulations. It was expressed to be issued "under and subject to the mining rules and regulations of the company." It bore on the face of it a statement that rent "payable in advance" was "1*l.* 5*s.* per calendar month for first six months, 2*l.* 10*s.* for each next twelve months, and 5*l.* per month thereafter." The rules and regulations of the company provide in express terms that from the date of the issue of a certificate of preliminary or complete registration the rents payable to the company "shall be payable monthly in advance," and that "in relation to the payment of all rents . . . . time shall be of the essence of the contract."

Hepple made default in payment of rent for May, and also for June.

On June 18, 1902, the resident general manager, under instructions from the board in London, declared Hepple's ten claims forfeited.

Hepple was not in actual occupation of the ground at the time. As soon as he heard of the forfeiture he tendered a sum to cover the rent in arrear, and demanded to be restored. His application was rejected. Then he brought this action, claiming restitution with compensation for disturbance, or in the alternative 5000*l.* damages. The case was tried before the Assistant Commissioner for the Bechuanaland Protectorate. Judgment was given in favour of Hepple with costs, ordering restitution with payment of the sum of 250*l.*, and awarding in the alternative 1800*l.* damages. The Resident Commissioner on appeal affirmed the judgment, but reduced the damages awarded in lieu of restitution to 1500*l.*

The principal question on the appeal to this Board was whether the published rules and regulations of the company confer upon the company the right to forfeit a certificate of registration on default in payment of rent. Assuming such right to exist under the rules and regulations of the company, it was contended on behalf of the respondent (1.) that the mining rights and privileges attached to the possession of a certificate of registration were equivalent to a lease of the ground, and that consequently, in accordance with Roman-Dutch law, forfeiture could not be enforced until after a period of two years' default, or, at any rate, until after judgment in a Court of law, and (2.) that the conduct of the company under the circumstances had been such as to preclude them from enforcing any right of forfeiture under their published rules and regulations.

Before dealing with the main question it will be convenient to dispose of these two contentions.

It appears to their Lordships that Hepple's holding under his certificate of registration was not equivalent to a lease of the block referred to in the certificate. The mining rights and privileges conferred by a certificate of registration do not, in their Lordships' opinion, fall under any head or category known to the Roman-Dutch law. The authorities that were cited at

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the bar satisfy their Lordships that the rights of the parties under a certificate of registration depend upon contract only, and must be governed by the special stipulations to which the parties have agreed.

It cannot be denied that in Hepple's case the company acted with unusual promptitude, not to say with exceptional harshness. There were many other holders of reef claims in arrear for rent at the time. Their mining claims, in the view of the company, were equally liable to forfeiture. But Hepple was the only one against whom the company chose to enforce extreme rights. His claims appear to have been forfeited because the directors of the company wanted to get the whole of the location of which Hepple's block formed part into their own hands, with some view of disposing of it to advantage on the London market. Still, however unusual or unexpected the action of the company may have been, it is difficult to see how indulgence to other certificate holders can, of itself and apart from other circumstances, raise an equity in favour of Hepple. Inequality in the treatment of persons all in the same position naturally gives rise to a sense of injustice. But the company did Hepple no wrong. He would have been no better off if the other defaulters had suffered with him.

Then it was said that something occurred that may have had the effect of leading Hepple to think that though he was in default there was no danger of forfeiture. It seems that a day or two before the forfeiture was declared Hepple's agent, or partner, one Ryan, called at the secretary's offices on some other business. As he was going away he observed that he would call again in two or three days and pay the rent for Little Eva. On this, it is said, the secretary replied, "All right." The secretary declares that he "said nothing to lead Ryan to suppose that he had any extension of time in which to pay his rent for claims." In fact, the secretary has no recollection of any conversation with Ryan about the Little Eva block. But, supposing he did make the remark which is attributed to him, it seems rather a slender foundation for a grave argument to the effect that the officials of the company gave Hepple to understand that the directors of the company

had no intention of enforcing their strict rights, especially when it is plain from the rules and regulations of the company that no one but the resident general manager has power to condone a forfeiture. It is not pretended that the secretary had anything to do with a matter of that sort.

The whole question then depends upon the true construction of the published rules and regulations of the company. The general scheme is simple enough. In every case everything begins with a "prospecting licence." On payment of a fee of 1*s.* the resident general manager may grant to any person of full age and appearing personally at the offices of the company a licence to prospect and search for any of the minerals to which the rules and regulations of the company apply. Before the issue of the licence the applicant is required to sign an undertaking to comply with all the mining rules and regulations of the company. Rule 8 provides that any person failing to observe the conditions of such undertaking "shall be liable to forfeiture of his prospecting licence and any privileges acquired thereunder."

The holder of a prospecting licence who may discover an ore-bearing reef may post in a conspicuous place within 50 feet of the point where the reef has been discovered a notice termed a "Discovery Notice." Then he has the exclusive privilege of prospecting for a period of forty days within an area of 1000 feet from the discovery point. Within the forty days he may peg off a block of ten claims, which is the normal size of a "block," and post a notice on the block styled the "Registration Notice." He has then seven days within which he may obtain a certificate of preliminary registration. From the issue of the certificate rent at the prescribed rate, 2*s.* 6*d.* for a reef claim for each of the first six months, becomes payable monthly in advance, and, as already stated, in regard to payment of rent, time is declared to be of the essence of the contract.

It was said, and said truly, that there is no provision in the rules and regulations declaring in express terms and in so many words that claims are liable to be forfeited in the event of any failure to pay rent. But that condition is necessarily implied.

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Without some provision of the sort, summary in character, automatic in action, and easy of application, it would be utterly impossible for the company to secure payment of small rents payable at short intervals by adventurers without fixed property, many of whom may be camping in places difficult of access. To any person reading the rules and regulations fairly, it must be plain that liability to forfeiture runs through the whole set, and is the groundwork on which the company must rely for the maintenance of its revenue. It is the ultimate and the only sanction of all the provisions and reservations in favour of the company.

It was contended by the learned counsel for the respondent, who argued the case with great care and ability, that liability to forfeiture under rule 8 terminated with the termination of the prospecting licence, which comes to an end when application is made for a certificate of preliminary registration. To that argument there are two answers. In the first place, it would be a very narrow construction of rule 8. All mining rights and privileges are consequent upon, and so are acquired under, the prospecting licence. They all flow from that licence, which is the first step in each and every case. The point, however, is made perfectly clear by rule 51, which provides that "at any time prior to forfeiture or after forfeiture and prior to regrant by the company the resident general manager may take into consideration the death of the holder of a mining location, or other special circumstances, and may, if satisfied that such special circumstances sufficiently account for failure to pay rents, dues, fees, or fines, condone or revoke the forfeiture on payment of all rents, dues, fees, and fines then due." Now it is plain on the face of the rules that under a prospecting licence no rent is payable. On the other hand, it is clear from rule 51 that failure to pay rent does create forfeiture.

Their Lordships, in the result, are of opinion that the judgments of the Assistant Commissioner and the Resident Commissioner cannot be supported. The action ought to have been and should be dismissed, but without costs. The judgment of the Resident Commissioner, except as to the claim in reconvention and the order for the respondent to pay the costs

of the appeal, should be discharged, and any damages paid under that judgment returned. The order of October 3, 1903, should not be disturbed. Their Lordships will humbly advise His Majesty accordingly.

The respondent must pay the costs of the appeal.

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Solicitors for appellants: *Flux, Leadbitter & Neighbour.*
Solicitors for respondent: *Slaughter & May.*

[PRIVY COUNCIL.]

RIDDIFORD . . . . . DEFENDANT;

AND

THE KING . . . . . PLAINTIFF.

J. C.* 1904 *Dec.* 6, 7. 1905 *Feb.* 8.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Law of New Zealand—Imperial Act (10 & 11 *Vict. c.* 112)—*Lands surrendered to the Crown subject to subsisting Contracts—Rights of Crown against Trespasser—Possession for less than Sixty Years.*

In an action of ejectment by the Crown it appeared that the lands in suit had in 1845 been included in a Crown grant to the New Zealand Land Company, which thereby acquired the legal estate therein subject to an equitable estate in favour of P., resulting from a prior contract of sale made with him by the company. In 1850 the company surrendered its lands including those in suit to the Crown, which thereupon, under an Imperial Act (10 & 11 Vict. c. 112), vested in Her Majesty, "subject nevertheless to any contracts which should then be subsisting in regard to any of the said lands." No conveyance was ever made to P. by the company, and after the surrender neither P. nor any of his heirs applied to the Crown for completion of the contract. In 1870 B. entered on the lands in suit which had been left derelict, and in 1885 conveyed them to the appellant:—

Held, that according to the true construction of the above Act the lands surrendered vested in the Crown in absolute ownership, unfettered as to any portion of them by any trust cognizable and enforceable by any Court of law or equity. Even if P.'s contractual rights against the

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* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD ROBERTSON, LORD LINDLEY, and SIR FORD NORTH.

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company had passed to the appellant, they were not such as a Court could enforce. The appellant was simply an intruder, who had not been in possession long enough to acquire title against the Crown.

APPEAL from a decree of the Court of Appeal (Nov. 10, 1903) reversing a decree of the Supreme Court (June 8, 1903).

The action was brought as a test case by the Crown to obtain possession, under the circumstances stated in their Lordships' judgment, of certain lands in the provincial district of Wellington, known as Allotments 18 and 19, Lower Hull District.

At the date of the action the appellant and his transferor had been in possession of the lands in suit for more than thirty years, and it was contended on his behalf that by such possession the equitable fee simple, which purported to have been vested in Partridge by virtue of a transaction of sale and purchase in 1839 between him and the New Zealand Land Company, had become vested by adverse possession against him in the appellant. The legal estate in the said lands eventually vested in the New Zealand Company under a Crown grant in 1845 subject to Partridge's equitable title, but under an Imperial Act (10 & 11 Vict. c. 112) the company in 1850 surrendered all claim and title to its lands to the Crown, without having conveyed to Partridge the lands in suit. This surrender by force of the Act vested the lands of the company in the Crown, "subject nevertheless to any contracts which should then be subsisting in regard to any of the said lands." Neither Partridge, who left the lands derelict, nor, after his death, any of his heirs applied to the Crown for completion of the company's contract with Partridge.

Edwards J. gave judgment for the defendant, with costs. He considered that the Court ought in the circumstances to presume a grant from the Crown to Partridge or to either of the persons named, Cook or Braithwaite, who assumed possession of the lands when left derelict. He considered that possession is primâ facie evidence of title, and no other title appearing in proof is evidence of seisin in fee: *Doe* d. *Carter* v. *Barnard* (1); *Asher* v. *Whitlock*. (2) The learned judge

(1) (1849) 13 Q. B. 945. (2) (1865) L. R. 1 Q. B. 1.

proceeded to cite Best on Evidence, 9th ed. p. 314: "The presumption of right in a party who is in possession of property, or of that quasi-possession of which rights only occasionally exercisable are susceptible, is highly favoured in every system of jurisprudence, and seems to rest partly on principles of natural justice and partly on public policy. By the law of England possession or quasi-possession, as the case may be, is primâ facie evidence of property—Melior (potior) est conditio possidentis—and the possession of real estate or the perception of the rents and profits from the person in possession of real estate is primâ facie evidence of the highest estate in that property, namely, a seisin in fee. But the strength of the presumption arising from possession of any kind is materially increased by the length of time of enjoyment, and the absence of interruption or disturbance from others who, supposing it illegal, were interested in putting an end to it. The rule is that where the facts shew the long-continued exercise of a right the Court is bound to presume a legal origin, if such be possible, in favour of the right. And in such cases the Courts have presumed, not only that the right had a legal origin, but many collateral facts, so as to render the title of the possessor complete according to the maxim 'Ex diuturnitate temporis omnia praesumuntur solenniter esse acta'":—and continued his judgment as follows:—

"If this be the correct rule, it appears to me that the Court ought to presume that Cook's possession, which began about 1857 or 1858, when he fenced in the land and occupied it, and which so far as can be inferred continued until Braithwaite entered into possession about 1870, was attributable to a legal right, and to the highest estate possible if the legal estate is to be considered as still outstanding in the Crown—namely, an equitable estate in fee simple. Upon the same principles it appears to me that Braithwaite's possession, which began in 1870 and continued until he sold and conveyed the land to the defendant in 1885, ought to be attributed to the same title.

"It appears to me, further, that upon the same principles the Court ought to presume that the lands in question were granted by the Crown either to Partridge, Cook, or Braithwaite,

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it matters not which. That a grant from the Crown may be presumed in a proper case is not disputed, and is established by many authorities: *Mayor of Hull* v. *Horner* (1); *Read* v. *Brookman* (2); *Attorney-General* v. *Dean of Windsor* (3); *Gibson* v. *Clark* (4); *Goodtitle* v. *Baldwin* (5); *Roe* d. *Johnson* v. *Ireland* (6); *Des Barres* v. *Shey* (7); *Doe* d. *Devine* v. *Wilson*. (8)"

The Court of Appeal reversed the judgment, holding that the presumption (if any) in favour of a grant by the Government was negatived by the evidence, which shewed that none had ever been made. It added: "It is not necessary to decide whether mere possession of Crown lands, without anything further, would entitle a Court to presume that a grant had been issued. If this is the law, then the Nullum Tempus Act appears to me to have been unnecessary: see Brown on Limitations, p. 96. The case of *Goodtitle* v. *Baldwin* (5) assumes at all events, in a case where the Crown did not contest the matter, that such a presumption could be made. (9) There is no case in which, where the Crown sued for intrusion, it was held that such a presumption would be made if sixty years had not elapsed. In *Rex* v. *Brown*, mentioned by Lord Mansfield in *Mayor of Hull* v. *Horner* (10), there had been possession for 150 years, and the case was before the Nullum Tempus Act. In *Devine* v. *Wilson* (11) the case was between subject and subject, and it was said that a supplementary grant could be presumed.

"No grants have ever been issued by the Governor, save as authorized by some Act of the Legislature, or under the Royal Instructions. Before any grant could have been issued under the New Zealand Company's Land Claimants' Ordinance there must have been a claim and an investigation under that Ordinance. Claims for grants have been made, and, after investigation, allowed for other allotments in section 11 of the

(1) (1774) 1 Cowp. 102.
(2) (1789) 3 T. R. 151.
(3) (1857) 24 Beav. 679.
(4) (1819) 1 Jac. & W. 159; 20 R. R. 266.
(5) (1809) 11 East, 488; 11 R. R. 249.
(6) (1809) 11 East, 280; 10 R. R. 504.
(7) (1873) 29 L. T. 592.
(8) (1855) 10 Moo. P. C. 502.
(9) 11 East, at p. 490.
(10) 1 Cowp. 102, at p. 110.
(11) 10 Moo. P. C. 502.

District, but none for sections 18 and 19. There can, therefore, be no presumption of a grant under the Ordinance, and grants by bounty or grace from the Crown are unknown in the Colony, even if such could be granted by the Governor: *Reg.* v. *Clarke*." (1) It found that the appellant had failed to shew continuous adverse possession by himself and his predecessors in title for a period of sixty years.

Asquith, K.C., and *Vaughan Hawkins*, for the appellant, contended that this judgment was wrong, and that the claim of the Crown was unfounded in law, and would if successful create injustice and hardship. The appellant's position was that the equitable estate in fee simple in the lands in suit which formerly vested in Partridge had become, in consequence of more than thirty years' adverse possession, vested in him, the Colonial being the same in this respect as the English law of limitation. Partridge derived his equitable title from the Land Order of 1839, the certificate of selection, and the Crown grant of 1845. The effect of the land order and certificate, both of which were obtained from the New Zealand Land Company, was not disputed. The company before and after its incorporation in 1841 acquired lands from the Maoris and made sales thereof to intending settlors. Assurances called land orders were issued by the company to purchasers. They were in the form of a receipt for purchase-money for a prescribed area, with a right of selection as provided by the regulations of the company, and contained an order on its resident officer to deliver a certificate as to the land selected, which was to be accepted as conclusive evidence of the selection, and as an actual delivery of the possession of the land selected. A land order was to be received as conclusive evidence of title and as a sufficient conveyance. But the holder was entitled to a further assurance from the company or their trustee. In case of request made, the resident officer was directed to procure a conveyance to be made with all convenient speed, which, however, was not to guarantee the purchaser against any proceedings under the authority of the British Government

(1) (1851) 7 Moo. P. C. 77.

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or Legislature. After the land order and certificate had been granted to Partridge the Crown, after proof that the native title had been ceded to the company, granted in 1845 to the company the lands included in their cession, including those in suit. Thereafter the company held the legal estate in the lands in suit upon trust for Partridge, or for any person in whom Partridge's equitable estate in fee simple might from time to time be vested. Partridge's title as purchaser was completed except as regards the conveyance of the legal estate. Title by adverse possession could be acquired against him though not necessarily against the vendor, who became a trustee of the legal estate for the new acquirer. Under 10 & 11 Vict. c. 112, s. 19, the company gave notice of surrender of their lands, which thereupon under the Act reverted to the Crown, subject to the contracts then subsisting. Under 14 & 15 Vict. c. 86, a conveyance by the Crown to a purchaser under a land order was to be as effectual as a conveyance by the company would have been. It was contended that under these circumstances the Crown as the statutory assignee of the company was and is bound, if required, to convey the legal estate in the lands in suit to Partridge, his heirs and assigns, by way of further assurance, as expressed in the land order. Partridge's position was not altered by this surrender, and the Crown as the assign of the fully paid vendor cannot set up the legal estate against the appellant. The Crown as such assign succeeded only to the rights of the company, not to any beneficial interest which it had aliened. It accordingly holds the legal estate in trust for the appellant, and is bound to convey it to him. Reference was made to *Cholmondeley (Marquis of)* v. *Clinton* (1), referring to *Davie* v. *Beardsham* (2); Lewin on Trusts, p. 911, "equitable disseisin."

Haldane, K.C., H. D. Bell, and *Northcote,* for the respondent, contended that no continuous and sufficient adverse possession had been made out to bar the title of the Crown in favour of the appellant, to whom, moreover, no grant had ever been made or could be presumed. Nor had the appellant or

(1) (1820) 2 Jac. & W. 1, 22, 156, 175, 196; 22 R. R. 84.
(2) (1664) 1 Ch. Ca. 39.

his transferor ever acquired title under the local Ordinance and statutes relating to claims to lands of the New Zealand Company. The foundation of the appellant's claim is that Partridge was statute-barred as against his trespasser, and it is assumed rather than shewn that Partridge's equitable estate became vested in his trespasser, and thence passed to the appellant. This at least admits that the Crown, on the lowest view of its rights, is entitled as trustee for Partridge. On that admission the Crown as trustee would only be barred in sixty years: see *Tichborne* v. *Weir* (1), and 3 & 4 Will. 4, c. 27, ss. 2, 34. Only Partridge could enforce that trust; the appellant cannot set it up. The cestui que trust could not be barred till the trustee was barred; but the trust (if any) is in favour of Partridge and his heirs, not of the appellant. Besides, in New Zealand title cannot be acquired by limitation; it must be either in manner prescribed by the Ordinances or by Crown grant: see *Johns* v. *Rivers* (2); *Allsworth* v. *Perry* (3); *Mudgway* v. *Davy* (4); *Alleyn* v. *Woods*. (5) The Crown's action of ejectment is not to be barred by limitation, only by the Nullum Tempus Act (9 Geo. 3, c. 16): *Burgess* v. *Wheate*. (6)

Vaughan Hawkins, replied.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The action which has led to this appeal was brought by the Crown to recover certain lands in the provincial district of Wellington known as Allotments 18 and 19, Section XI., Lower Hutt District. Mr. Edward Joshua Riddiford, who had been in possession of the lands in dispute for many years, defended the action and resisted the claim of the Crown on various grounds.

In the Supreme Court the action was dismissed by Edwards J., who tried the case without a jury. His decision, however, was reversed in the Court of Appeal, and there judgment was given for the Crown.

There are no facts in dispute. Nor is the case, in their

(1) (1892) 67 L. T. 735.
(2) (1874) 2 N. Z. App. Ca. 344.
(3) (1883) N. Z. L. R. 2 S. C. 184.
(4) (1886) 4 N. Z. L. R. 192.
(5) (1893) 68 L. T. 143.
(6) (1759) 1 Eden, 191.

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Lordships' view of it, embarrassed by any difficult questions of law. In order to explain the position of the parties and their relative rights, it will only be necessary to give a brief history of the property, accompanied by a summary of the principal statutes and ordinances bearing on the question which were referred to in the course of the argument.

It seems that before the year 1839 an association had been formed in London to promote the colonization of New Zealand, then a dependency of the Colony of New South Wales. The association was originally unincorporated and called the New Zealand Land Company. It was afterwards incorporated under the name of the New Zealand Company by letters patent dated February 12, 1841. The object of the company both before and after its incorporation was to acquire land in New Zealand from the Maoris or aboriginal inhabitants for the purpose of forming settlements and parcelling out the land for sale to intending emigrants. The practice was for the board of directors to issue to each purchaser a document of title, called a "land order," authorizing him to select a section of land consisting of one town acre and 100 country acres in a particular settlement. The order purported to be addressed to the resident officer of the company for saleable lands. It stated that payment had been made for the purchase with the right of selection attached to it, and directed the resident officer, on the selection being made, to issue a certificate under his hand which, in the words of the order, was to be "accepted as conclusive evidence of the selection, and as an actual delivery of the possession of the land selected." The order then provided for the execution of a conveyance to the purchaser, if required; but it was expressly stipulated that the persons executing the conveyance were not to be "considered as guaranteeing the title against the results of any proceedings of or under the authority of the British Government or Legislature."

On August 1, 1839, a Mr. Thomas Mitchell Partridge purchased a land order under which he selected a town acre in Wellington and a country section known as Section XI., Lower Hutt District. He was a merchant in Wellington at the time,

and in partnership with one Fitzherbert. The purchase was made with partnership funds. Partridge and his partner divided the section into allotments and put it up for sale by public auction in 1841. Some allotments were sold, but Allotments 18 and 19, the lands now in dispute, did not find a purchaser. The partnership was dissolved soon afterwards, and those two allotments, which contained about 5 acres apiece, were made over to Partridge in severalty as part of his share of the assets.

New Zealand was separated from the Government of New South Wales and erected into a Colony by Royal Charter dated November 16, 1840. At that date there was a commission in existence which had been appointed under an Act of the Legislature of New South Wales, passed in 1840, for the purpose of inquiring into all claims to grants of land in New Zealand. When New Zealand became an independent Colony this commission was determined and replaced by an Ordinance of the Legislature of New Zealand known as "Land Claims Ordinance No. I. (New Zealand)." Adopting the provisions of the New South Wales Act of 1840, it declares (s. 2) that "all unappropriated lands within the said Colony of New Zealand subject however to the rightful and necessary occupation and use thereof by the aboriginal inhabitants of the said Colony are and remain Crown or domain lands of Her Majesty her heirs and successors . . . . and that all titles to land in the said Colony of New Zealand which are held or claimed by virtue of purchases or pretended purchases gifts or pretended gifts conveyances or pretended conveyances leases or pretended leases agreements or other titles either mediately or immediately from the chiefs or other individuals or individual of the aboriginal tribes inhabiting the said Colony and which are not or may not hereafter be allowed by Her Majesty her heirs and successors are and the same shall be absolutely null and void." Then provision was made for the appointment of commissioners to inquire into and report on all cases in which lands were claimed under titles derived from the aboriginal inhabitants.

On July 29, 1845, after due inquiry and report, a Crown grant of a large tract of land which comprised Section XI., Lower Hutt District, was issued to the company.

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The company thus acquired the legal estate in the lands selected by Partridge under his land order of August 1, 1839. And Partridge obtained a valid equitable title to Allotments 18 and 19.

By an Imperial Act passed in 1846 (9 & 10 Vict. c. 382) further powers were granted to the company, and provisions were made intended to facilitate the execution of conveyances by or on behalf of the company to persons entitled to grants of land under land orders.

By another Imperial Act passed in 1847 (10 & 11 Vict. c. 112) intituled "An Act to promote Colonization in New Zealand and to authorize a Loan to the New Zealand Company," certain further powers were granted to the company. And then, by s. 19, after reciting that it was expedient to provide for the contingency of the company finding themselves unable to continue their proceedings with profit to themselves and benefit to the Colony, it was enacted that if the directors should give notice as therein mentioned within three calendar months next after April 5, 1850, that they were ready to surrender the charters of the company to Her Majesty, and all claim and title to the lands granted to them in the Colony, all the powers and privileges of the company (except such as should be necessary for enabling the directors to receive the several sums of money thereinafter mentioned, and to distribute the same amongst the shareholders and other persons entitled thereunto, and for enabling the directors to adjust and close the affairs of the company) should cease and determine, and all the lands, tenements, and hereditaments of the company in the Colony should "thereupon revert to and become vested in Her Majesty as part of the demesne lands of the Crown in New Zealand, subject nevertheless to any contracts which" should "then be subsisting in regard to any of the said lands," and upon a condition which does not affect the present question.

In 1849 another Imperial Act (12 & 13 Vict. c. 79) was passed to facilitate the execution of conveyances and other instruments by or on behalf of the company in New Zealand, and on October 1 of that year the directors of the company issued a

notice in London to the effect that the company, having received Crown grants, was prepared to execute conveyances to owners of land in the company's settlements in the Colony in accordance with the original land orders and the Act of 1846.

On July 4, 1850, the company gave due notice of surrender in accordance with the provisions of the Act of 1847, and thereupon Section XI., Lower Hutt District, of which no conveyances or conveyance had been executed by or on behalf of the company, together with all other lands, tenements, and hereditaments of the company in New Zealand, reverted to and became vested in the Crown as part of the demesne lands of the Crown in New Zealand.

It appears from an entry in one of the company's records called the "Selection Book" that Thomas Mitchell Partridge, the purchaser of Section XI., died at Sydney, New South Wales, some time before December 20, 1851.

No application to the Crown for completion of the company's contract with Partridge was made by him in his lifetime. Nor has any such application ever been made since his death by any person claiming to be entitled to the benefit of that contract in respect of Allotments 18 and 19. It was stated at the bar that it is not known who are Partridge's heirs or sequels in right.

Allotments 18 and 19 seem to have been left derelict at the time of Partridge's death. They were then of little or no value. They were liable to the incursion of the sea at spring tides and occasionally at ordinary high tide, and they were consequently unfit for habitation. However, there was a great earthquake and upheaval of land near Wellington in 1855 which had the effect of improving the land, by raising it permanently several feet. There is some evidence to shew that, at some time between Partridge's death and 1870, one Cook, who was the owner of an allotment in Section XI., was in the habit of allowing his cattle to stray over Allotments 18 and 19, but there is no proof that at any time between those dates any person was in possession of the land or that Cook himself made any claim to it. In 1870 a man named Braithwaite, who is said to have been a farmer in the neighbourhood, entered upon the land and held possession until 1885, when he

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sold his interest for 75*l.* to the appellant and executed a conveyance to him. So that the appellant may be taken to have a title by possession going back to 1870, but no further.

After the lands of the New Zealand Company revested in the Crown, the Legislature of New Zealand made ample and elaborate provisions for enabling all persons claiming the benefit of contracts with the company to come in and prove their title in order that all contracts under land orders might be completed by grants from the Crown. The earliest enactment was "The New Zealand Company's Land Claimants' Ordinance, 1851." It is stated in one of the recitals to that Ordinance that no conveyances were made by the company pursuant to the provisions of the Imperial Act of 1846. Commissioners were to be appointed to inquire and report, and a simple form of procedure was prescribed. The time limited for the settlement of claims was short, but there were provisions for extending it, and it was extended from time to time. In 1892 an Act was passed declaring that claims not finally disposed of on June 30, 1894—a period afterwards extended to June 30, 1896—should be deemed to have lapsed unless the time were extended by the Supreme Court. Every claim when declared lapsed was to be deemed abandoned, and on the publication of the list of lapsed claims the land was to be deemed to be demesne lands of the Crown discharged and free from all contracts and engagements whatever.

Mr. Riddiford, of course, is not concerned with the legislation consequent upon the revesting of the company's lands in the Crown. He does not claim, and indeed he never pretended to claim, the benefit of any contract with the company. But in order to complete the story some reference to that legislation was necessary, and incidentally it affords an explanation of the circumstances under which the provision for revesting was made, and suggests the reason why that course was adopted.

Edwards J. decided in favour of the defendant on the ground that a Crown grant ought to be presumed. This view was not pressed at the bar. Their Lordships agree with the Court of Appeal that there is no room for such a presump-

tion in the present case, unless indeed a Crown grant is to be presumed in every case in which an intruder on Crown property has been in possession for a period long enough to extinguish the title of a private owner out of possession.

Before this Board the argument on behalf of the appellant was rested mainly on the Statute of Limitations in force in New Zealand, which is a reproduction of the Act 3 & 4 Will. 4, c. 27. It was argued that a purchaser who had selected a section under his land order would be secure in relying on his equitable title, and was not obliged to come in and prove his claim to a Crown grant—a position which seems to have commended itself to the late Chief Justice, though the present Chief Justice takes a different view. Then it was contended that, inasmuch as Partridge's equitable title was extinguished, the defendant somehow or other got the benefit of the position that Partridge's representatives had lost. The Crown, it was said, was a bare trustee of the legal estate, and, when once the cestui que trust was barred, the legal estate vanished or followed the ownership of the land. At any rate, the Crown was not justified in interfering and confiscating Mr. Riddiford's interest for the sake of the unknown heir of a deceased absentee, still less for its own ultimate profit.

The argument was somewhat difficult to follow, and it may be that an attempt to present it in a condensed form does not do it full justice. But it is not necessary to examine the position critically, because in their Lordships' opinion there is a fallacy lying at the root of the argument. In their view the Statute of Limitations has nothing to do with the question.

In their Lordships' opinion it is a mistake to suppose that when the company surrendered its charter the Crown assumed the position which the company had occupied before the surrender. All the property of the company, lands which had been bought and actually selected under land orders as well as lands which had never been dealt with or offered for sale, reverted to and vested in the Crown in absolute and unqualified dominion. In one and the same character the Crown took over all alike. It did not become owner of part and trustee

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of part. No trust, cognizable and enforceable by any Court of law or equity, was created by the operation of the statute of 1847. The Crown, no doubt, took upon itself the obligation of completing all the contracts of the company. That was a solemn engagement, announced publicly, on the faith of which the company surrendered its charter. It is impossible to suppose that such an engagement would not be scrupulously fulfilled to the very letter. But suppose there were a failure on the part of the Crown in carrying out its engagement (if it be permissible for the sake of argument to make such a supposition) no Court of law or equity could give relief. The only remedy would lie in representation and remonstrance addressed to the advisers of the Crown.

It may perhaps be asked, Why was all the property of the company vested in the Crown in absolute ownership? The answer may be found in the New Zealand Company's Land Claimants' Act, passed in 1892. It appears from a recital in that enactment that in Wellington and four other provinces various town, rural, and suburban sections of land had remained unclaimed for a period of upwards of thirty years, and, "in the interests of settlement," as the Act proceeds to declare, it was not expedient that any such claims should remain open for an indefinite period. Now the mischief which attracted the attention of the Legislature in 1892—the mischief resulting from lands lying derelict and unproductive, in many cases probably in the choicest sites in town and country—must have been even more serious in the early and less prosperous days of the Colony. What was the Government to do? If the legal estate in every section paid for and selected under a land order had been vested by statute in the purchaser, the mischief would have continued unchecked. There would have been no pressure on a purchaser who was content to leave his property to take care of itself to come forward and claim it. If the Crown had assumed the position of trustee in the case of these unclaimed lands the mischief would have been aggravated, for in that case the owner, if the purchaser or the purchaser's representative may be called the owner, would not be liable to have his title extinguished by the Statute of Limitations. He

would have the benefit of the more lengthened period required to extinguish the title of the Crown.

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Now, if the view that has been indicated as to the position of the Crown be the true view, it is obvious that there is nothing special about the case at all. The defendant is in possession of Crown property, but he has not been in possession long enough to acquire title against the Crown. He is simply an intruder without any right, title, or equity to support his claim.

Their Lordships, therefore, are of opinion that the judgment of the Court of Appeal ought to be affirmed, and they will humbly advise His Majesty accordingly.

The appellant will pay the costs of the appeal.

Solicitors for appellant: *Blyth, Dutton, Hartley & Blyth.*

Solicitors for respondent: *Mackrell, Maton, Godlee & Quincey.*

[PRIVY COUNCIL.]

MUNICIPAL COUNCIL OF SYDNEY . PLAINTIFFS;

AND

AUSTRAL FREEZING WORKS, LIMITED . . . . . } DEFENDANTS.

J. C.* 1904 *Dec.* 1, 2. 1905 *Feb.* 22.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Sydney Corporation Act, 1879, s. 139—*Construction—By-law No.* 10 *ultra vires—Power to charge Fees on Cattle in Municipal Sale-yards only.*

By ss. 132 and 138 of the Sydney Corporation Act of 1879 the appellants were authorized to establish and license, within certain local limits, sale-yards for the sale of cattle, and also places for the slaughter thereof; and by s. 139 they were empowered to charge fees set forth in by-laws to be made in that behalf on cattle intended for slaughter "yarded or brought for sale by auction to any sale-yards or premises in the city of Sydney or within the distance of fourteen miles therefrom as hereinbefore provided," the schedule of maximum charges being confined to

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* *Present:* LORD MACNAGHTEN, LORD LINDLEY, SIR FORD NORTH, and SIR ARTHUR WILSON.

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animals received into the yards for sale and not referring to animals intended for slaughter :—

Held, that by the true construction of s. 139 it contemplated an owner of cattle intended for slaughter bringing them to sale-yards established by the appellants, and that a by-law authorizing charges on cattle brought by the respondents to their own private yards within the same local limits and there slaughtered was ultra vires.

APPEAL from a decree of the Supreme Court (Aug. 10, 1903) directing a verdict to be entered for the respondents in an action brought by the appellants to recover 826*l.* as fees on sheep and cattle brought by the respondents to their own yards, which were situated within the local limits prescribed by the Act in question, to be converted into frozen meat for exportation.

The said fees were market dues, and were claimed as being authorized under s. 139 of the Sydney Corporation Act of 1879 (49 Vict. No. 3), the material sections of which are set out in their Lordships' judgment. The claim was based upon by-law No. 10, made by the appellants on December 5, 1900, under s. 139, and the question raised by a special case and decided in the affirmative by the Supreme Court was whether this by-law was ultra vires the appellants. Stephen C.J. and Owen J. held that, when cattle as defined in the Act of 1879 and intended for slaughter are yarded in premises belonging to a private owner, though within the prescribed limits, the appellants are not empowered by the Act to charge fees in respect thereof. Simpson J., on the contrary, held that they were.

Butcher, *K.C.*, and *Austen-Cartmell*, for the appellants, contended that the by-law was intra vires and operative. By s. 139 of the Act of 1879, power to charge fees was given in respect of all cattle intended for slaughter yarded anywhere within the prescribed limits. It was immaterial whether they were yarded in the yards of private owners or in the municipal sale-yards established by the appellants. The by-law enacted to that effect, and it was within the powers conferred by s. 139 according to the true construction of that section. The liability was in respect of animals intended for slaughter and yarded within certain local limits.

H. Terrell, K.C., and *Vaughan Hawkins*, for the respondents, contended that the power to impose fees conferred by s. 139 was limited to cattle intended for slaughter and yarded in sale-yards or premises established or licensed by the appellants. The power did not extend to the levy of fees on cattle yarded in private yards which were not sale-yards within the meaning of the Act, in this case the private property of the respondents, with which the appellants had nothing to do either under the Act or otherwise. Sect. 139 no doubt was substituted for s. 6 of the earlier Act (33 Vict. No. 16). Neither of the Acts prohibited sale-yards other than those established by the appellants, and both Acts limited the power to charge fees in respect of cattle yarded in the appellants' yards.

Butcher, K.C., replied.

The judgment of their Lordships was delivered by

SIR FORD NORTH. This is an appeal from a judgment of the Supreme Court of New South Wales dated August 10, 1903, in an action brought by the appellants to recover a sum of 826*l.* 19*s.* 9*d.* for market fees on sheep and cattle of the respondents. Two of the three judges who heard the case held that the appellants were not entitled to make such charge, and judgment was given for the respondents. The third judge (Simpson J.) was of opinion that the appellants were entitled to succeed. There is no dispute as to the facts, which are set forth in a special case.

The respondents carry on business in Sydney as exporters of frozen meat. They purchase sheep and cattle in various parts of the State of New South Wales, and drive them to their yards for slaughter there prior to export. After being slaughtered the carcases are cleaned and frozen, and brought to Sydney, and thence exported. None of them are sold on the respondents' premises or within the said State. The respondents' yards are not sale-yards.

By the Act 57 Vict. No. 21, the regulation of premises used for slaughter purposes in any part of the State of New South Wales (not being within the city of Sydney or within three miles thereof) is committed to the council of the municipality

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in which such premises are situate, and it is provided that annual licences at prescribed fees must be obtained from such council by the persons so using the premises.

The yards of the respondents are more than three, but less than fourteen, miles from the city of Sydney, and are within the municipal district of Granville, in the said State; and the respondents have obtained and hold a licence from the council of that district to slaughter sheep and cattle upon those premises, and have paid the prescribed fees in respect thereof. Such premises are not in any way under the control or jurisdiction of the appellants; they are the private property of the respondents.

The case of the appellants is based upon the 10th of their by-laws; and this does at first sight give some colour to their claim; but, as the respondents' contention is that such by-law is not warranted by the Act under which it purports to be made, and that such Act gives no power to charge the respondents with the fees in question, it is necessary to consider its provisions with some care.

That Act is "1879, 43 Vict. No. iii.," the short title of which is the "Sydney Corporation Act of 1879." The head-note to Part. VII. (ss. 126–140) of that Act is "Markets, Parks, Cattle Sale-yards, &c."

Sect. 132 provided that it should be lawful for the municipal council of the city of Sydney to establish in such place or places as they might determine adjoining the Great Southern and Western Railway, not more than fourteen miles from the city of Sydney, buildings, yards, and other premises for the sale of cattle, and authorized them to purchase and hold lands for the purpose; and to provide funds for the erection and maintenance of such buildings, yards, and premises by borrowing money.

Sect. 133 provided that after such sale-yards were ready to receive cattle the Government might proclaim them to be the metropolitan sale-yards, and they should thenceforth be the only market or place within the city of Sydney and the limits mentioned in s. 132 for the sale of cattle, except as provided in s. 138; and any person who sold cattle or offered them for sale

(except as after provided) within the city or fourteen miles thereof was subjected to a penalty.

Sect. 137 provided for the application of the proceeds of the fees on the sale of cattle at such yards, and all other profits accruing therefrom, after payment of the current expenses incident to the maintenance of such premises, towards payment of the principal sum borrowed and interest; an account thereof to be called the "Cattle Sale-yards Fund" being kept by the city treasurer. No provision is found in the Act dealing with the application of any such moneys as the appellants are suing for.

Sect. 138 gave the council power to erect, maintain, or license sale-yards within the city of Sydney, or fourteen miles therefrom, for the sale of calves, lambs, pigs, milch cows, and horses; and also to license places within the said city or limits for the slaughter of pigs, calves, and sheep, and to frame regulations for the management thereof.

Sect. 139 runs as follows:—

"When any sale-yards are established, and by-laws in respect to such yards are made and published, it shall be lawful for the council to take and demand in respect of any cattle intended for slaughter yarded or brought for sale by auction to any sale-yards or premises in the city of Sydney or within the distance of fourteen miles therefrom as hereinbefore provided the fees or charges specified and set forth in by-laws to be made in that behalf, such fees and charges not to exceed the scale provided in Sched. G hereto."

Sect. 224 provided that the council might make by-laws for carrying out the provisions of the Act.

Sched. G to that Act, specifying the scale of maximum rates of market fees and charges, was confined to animals received into the yard for sale. There is no reference to or charge for animals intended for slaughter.

The appellants long since completed and proclaimed the sale-yards contemplated by ss. 132 and 133, and they are known as the Metropolitan Cattle Sale Yards at Flemington, or the Flemington Sale Yards. The council also duly made by-laws under s. 224 which were amended in 1894, and again

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in December, 1900; and by-law 10 of the by-laws as last amended is as follows:—

"Scale of Market Dues.

"The following tolls or dues shall be the fees and charges payable to the council on cattle received into the Metropolitan Cattle Sale Yards at Flemington for sale, and upon all cattle intended for slaughter only yarded in yards (other than those licensed or owned by the council) in the city of Sydney or within fourteen miles thereof."

And then follows a list of the tolls.

The appellants, in support of their contention that the by-law is authorized by s. 139, rely upon the fact that the word "in" is not found following the word "yarded," and must be sought elsewhere; and they find it by reading the section as though it ran "yarded in the city of Sydney or within the distance of fourteen miles therefrom as hereinbefore provided," omitting the intervening words. But no plausible reason was given for such omission; and it is a far more arbitrary alteration of the section than the mere addition of the word "in" after "yarded." Moreover, it gives no meaning to the words "as hereinbefore provided"; for there is no antecedent provision in the Act contemplating the imposition of a charge upon a person merely slaughtering his own cattle on his own close. If those words refer to yards for the establishment and licensing of which provision is made by ss. 132 and 138 their meaning is intelligible; but then the respondents do not come within them. It was suggested that the words "as hereinbefore provided" referred to the limits; but in that case they would be unmeaning and useless, as the limits have just been mentioned.

In the opinion of their Lordships, the meaning of s. 139 is free from doubt, though it is not very happily worded. It must be construed as if the word "in" had followed the word "yarded." It contemplates an owner of cattle intended for slaughter bringing them to sale-yards established by the council, who are authorized to make charges for the use

thereof; but not the case of a person bringing his own cattle to his own private yard, and lawfully killing them there.

The dissentient judge in the Supreme Court relied upon an earlier Act, the short title of which was the "Cattle Sale Yards Act, 1870" (33 Vict. No. 16), the 6th section of which was, for present purposes, identical with s. 139 of the Act of 1879, by which latter Act the Act of 1870 was repealed. The learned judge held that, under s. 6 of the first Act, the council could legally have imposed fees and charges upon any cattle intended for slaughter yarded in the city of Sydney or within ten miles thereof; and that s. 139 of the later Act, in which the same words were used, was intended to preserve a right to the council similar to that which it had possessed under s. 6 of the former Act. Their Lordships do not concur in this view of the earlier Act. It is hardly worth while to criticize in detail the language of an Act repealed twenty-five years ago. It is sufficient to say that, looking to the title, the preamble, and the material sections of that Act, their Lordships are of opinion that it conferred no right to charge fees, except in respect of the use of yards established for the sale of cattle. The conclusion drawn by the learned judge from his wider construction of the earlier Act is therefore, in their Lordships' view, not well founded.

Their Lordships are of opinion that the 10th by-law, so far as it purports to authorize charges for cattle intended for slaughter yarded in yards not established or licensed by the council, is ultra vires and invalid; and they will humbly advise His Majesty that the appeal should be dismissed.

The appellants must pay the costs of the appeal.

Solicitors for appellants: *Ullithorne, Currey & Co.*
Solicitor for respondents: *G. M. Light.*

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COX . . . . . PLAINTIFF;

AND

ENGLISH, SCOTTISH, AND AUSTRALIAN BANK, LIMITED . . . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Action for Malicious Prosecution—Verdict set aside—New Trial.

In discharging the verdict of a jury, the Court must be satisfied that there is such a preponderance of evidence against it as to make it unreasonable and almost perverse that the jury, when instructed and properly assisted by the judge, should have returned it.

Metropolitan Ry. Co. v. *Wright*, (1886) 11 App. Cas. 152, followed.

A verdict for damages for having been adjudged insolvent maliciously and without reasonable and probable cause was rightly set aside when it appeared that, assuming the plaintiff was not keeping out of the way of his creditors with a view to delay them, there was evidence which might lead a reasonable man to believe that he was.

The question of reasonable and probable cause should not be left to the jury, but determined by the judge on facts found by the jury.

APPEAL from an order of the Full Court (Sept. 11, 1903).

The question at issue, under the circumstances stated in their Lordships' judgment, was whether the respondents had maliciously and without reasonable and probable cause instituted and prosecuted insolvency proceedings against the appellant.

The jury found that the appellant did not depart from his dwelling-house with intent to delay his creditors, and that the respondents did not honestly believe that he had so departed, and gave a verdict for 750*l.* damages.

The Full Court ordered a new trial, the Chief Justice holding, apart from the question of special damage, that the verdict was unsupported by the evidence.

Haldane, K.C., and *Hans Hamilton*, for the appellant, contended that there was sufficient evidence to negative the

* *Present:* LORD DAVEY, LORD ROBERTSON, SIR FORD NORTH, and SIR ARTHUR WILSON.

existence of reasonable and probable cause for the insolvency proceedings. The question of malice did not depend upon whether it was possible for the respondents' manager to draw from the appellant's conduct the inferences upon which he acted, but whether it was reasonable that he should do so, and that was for the jury to decide. Their view was that he did not act honestly in drawing the inferences which he said he did, and they disbelieved his statement that he did draw them. That view is conclusive unless the Court could say that it was so opposed to the evidence as to be perverse. Reference was made to *Metropolitan Ry. Co.* v. *Wright* (1); *Abrath* v. *North Eastern Ry. Co.* (2); *Quartz Hill Gold Mining Co.* v. *Eyre.* (3)

Asquith, K.C., and *Boydell Houghton*, for the respondents, were not heard.

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The judgment of their Lordships was delivered by

Lord Davey. The action out of which this appeal arises was brought for the purpose of recovering damages for what is usually called "malicious prosecution." The plaintiff (the present appellant) alleged that he had been adjudged insolvent maliciously and without reasonable and probable cause. The jury found a verdict in favour of the appellant, and gave him 750*l.* damages.

A motion was made before the Full Court that the verdict and judgment should be set aside and a new trial had between the parties, on the grounds that the verdict was against the evidence and that the damages were excessive. The Full Court, consisting of three judges, unanimously discharged the verdict and granted a new trial, except on one point, namely, as to the special damage.

Their Lordships have been referred to the case of *Metropolitan Ry. Co.* v. *Wright* (4) as laying down the conditions subject to which, and the principles upon which, the Court should exercise the jurisdiction of granting a new trial on the

(1) 11 App. Cas. 152, 156.
(2) (1886) 11 App. Cas. 247, which affirmed the decision of the Court of Appeal, (1883) 11 Q. B. D. 440.
(3) (1883) 11 Q. B. D. 674.
(4) 11 App. Cas. 152.

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ground that the verdict is against the weight of evidence. In their Lordships' opinion, the principle cannot be better stated than it was by Lord Selborne in the Court of Appeal in that case (1): "In many cases the principles on which new trials should be granted on the ground of difference of opinion which may exist as to the effect of the evidence have been considered, both in the House of Lords, and in the lower Courts, and I have always understood that it is not enough that the judge who tried the case might have come to a different conclusion on the evidence than the jury, or that the judges in the Court where the new trial is moved for, might have come to a different conclusion; but there must be such a preponderance of evidence, assuming there is evidence on both sides to go to the jury, as to make unreasonable, and almost perverse, that the jury, when instructed and assisted properly by the judge, should return such a verdict"; and judgments to the same effect were delivered on the appeal in that case to the House of Lords by the present Lord Chancellor, and other noble and learned Lords.

Now it is important to consider what it is in an action of this kind that the plaintiff has to prove, and what are the respective functions of the judge and the jury. The principles applicable in these cases have been laid down for the English Courts in the case of *Abrath* v. *North Eastern Ry. Co.* (2), in which Bowen L.J. said: "This action is for malicious prosecution, and in an action for malicious prosecution the plaintiff has to prove, first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be, in the eyes of the judge, inconsistent with the existence of reasonable and probable cause; and, lastly, that the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice." At p. 457 he says: "Now in an action for malicious prosecution the plaintiff has the burden

(1) 11 App. Cas. at p. 153. (2) 11 Q. B. D. 440, at p. 455.

throughout of establishing that the circumstances of the prosecution were such that a judge can see no reasonable or probable cause for instituting it."

Their Lordships will take each step of the inquiry in turn. In the first place, they will assume in the plaintiff's favour that he is innocent, that is to say, that he was not absenting himself from his dwelling-house with a view to delay his creditors, and that his innocence was declared by the Court before which the accusation was made. Their Lordships will assume, for the purposes of the present case, that the bank manager and Mr. Hart were mistaken in thinking that he was absenting himself from his dwelling-house with a view to delay his creditors, and that the Supreme Court (in Insolvency), in the exercise of its jurisdiction, intended to pronounce his innocence; but that is not enough. The plaintiff has also to prove that there was a want of reasonable and probable cause for the prosecution, or (as it may be otherwise stated) that the circumstances of the case were such as to be, in the eyes of the judge, inconsistent with the existence of reasonable and probable cause.

Now the proceedings at the trial in this case were not conducted with extreme strictness, because the question whether there was reasonable and probable cause was left to the jury, whereas the judge ought to have determined that for himself upon the facts found by the jury. That irregularity is pointed out in the judgments of the learned judges in the Full Court. Their Lordships will assume that the learned judge who tried the case, Real J., in giving judgment for the appellant, intended to express his own concurrence in the finding of the jury to the effect that, upon the facts given in evidence, there was no reasonable or probable cause for the proceedings; but they must remark that, if this case is tried again, care should be taken by the learned judge who tries it to reserve for himself the duty of saying whether, on the facts given in evidence, there was reasonable or probable cause.

As there may be a new trial in this case, their Lordships do not desire to analyze the evidence with any great minuteness, or to express any opinion upon the effect of the evidence

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further than that which is implied in this judgment; but they will deal shortly with the history of the case.

It appears that the appellant was a customer of the respondent bank, and that his account was considerably overdrawn. There had been a change of managers of the bank, and the new manager, Mr. Hooper—using, as he had a right to use, his knowledge of the circumstances of the appellant, and of other circumstances bearing upon the question—appears to have been extremely dissatisfied with the state of the appellant's account, and to have been anxious that the account should be put in order and the appellant's overdraft wiped off. Negotiations took place with that view, but without success, the appellant—possibly with reason—declining to give a bill of sale over his assets, which was what was demanded by the bank manager. Ultimately, on February 14, 1903, Messrs. Flower & Hart, the solicitors of the bank, wrote to the appellant as follows:—

"We are instructed by our clients the English, Scottish, and Australian Bank, Limited, to demand from you, and we do therefore hereby demand from you, payment of the sum of 7511*l.* 3*s.* 8*d.* being the amount of your own, and the firm of Cox & Sealey's, overdrawn banking accounts with the bank, including interest to date. Unless we receive payment of the above amount, together with 2*l.* 2*s.* our costs, by 12 o'clock noon on Monday next, the 16th instant, or you make to us by the time named some proposal satisfactory to the bank for the liquidation of the debt at an early date, we will issue a writ against you on behalf of the bank for recovery of the debt without any further notice or delay."

Thus the appellant had notice on February 14, 1903, that a writ would be issued against him. He appears, very wisely, to have consulted his solicitor, a Mr. Drury, and the latter had several communications with Mr. Hart, the solicitor of the bank, the result of which was, according to the evidence of Mr. Hart, that on the morning of February 17 Mr. Drury went to Mr. Hart's office and said, "Cox will not make any further offer. You will have to issue your writ, and he will file. Mrs. Cox will distrain for rent." The appellant was a

tenant of his mother, Mrs. Cox, of some property at Pimpana in Queensland, on which large arrears of rent were due. Then Mr. Hart says, "That was at about 9 o'clock in the morning. I gave instructions then to issue a writ, and it was issued on the 18th."

Now what happened when the writ was issued? Their Lordships have the evidence, first, of Mr. Maurice Wren, who was not cross-examined upon this point. He was the managing clerk of Messrs. Flower & Hart, and says, "When I issued the writ I took it to the Australian Wine Vaults"—that was Mr. Cox's place of business in Brisbane—"to where [*sic*] I addressed a letter of demand, and I saw there Mr. Macfarlane. I asked Mr. Macfarlane if Mr. Cox was in. He said he was not, and he also told me that he had not been there for some days, and that he only called there occasionally, and he might not come in for days at a time. I asked him if he knew where I was likely to find him. He said he did not know. I believe I asked him, too, if he was likely to be in there shortly. He told me that he could not tell me—that he did not know." Mr. Wren then handed the writ to Brown, a bailiff of the Small Debts Court. Brown employed his son, Ernest William Brown, to serve the writ at Mr. Cox's residence near Brisbane, and this is what Mr. Brown the younger says: "On Thursday, 19th February last, my father handed me a Supreme Court writ by the defendant Bank against the plaintiff Cox. I went to Cox's residence on Nudgee Road to serve him. I left Sandgate at 8 o'clock in the morning and I got to Hendra in about a quarter of an hour. At Hendra I asked the station-master if he had seen Mr. Cox. He said that he had not seen him for some time. My father told me to go to his (Cox's) house that morning to effect service of the writ. I went to the house and I knocked at the door. A young lady came out. I took her to be the servant. I asked, 'Is Mr. Cox in?' She said, 'No. He was away at the Tweed.'" (The Tweed river is outside the jurisdiction of the Courts of Queensland.) "I asked if she knew when he would be back. I am not sure whether she said he would not be back for a fortnight or whether she said that she did not know. I asked her could she

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tell me his address. She said, 'No.' It was about 9 o'clock when I got to Cox's house. I came to town from Hendra with my father and told him what had occurred." Mr. Hart then says that on the 19th Mr. Wren told him that Brown had not been able to effect service, and what he had been told at Mr. Cox's house, and then he goes on: "I then telephoned to Mr. Drury. I said, 'We have not been able to serve that writ on Cox yet. I suppose you won't accept service for him?' He said, 'No, you had better find him.' I said, 'Well, do you know where he is?' He answered and said, 'No, old man, but he did talk of going to the Tweed. I did not see him all day yesterday.'" That brings the story to February 19. There is evidence that Cox was seen by young Brown at the races at Brisbane on Saturday the 21st, and by Wren at a place called Sandgate, some distance from Brisbane, on the following day. On the afternoon of February 23, Brown having been unsuccessful in serving the writ, the application to declare Cox insolvent was made on an affidavit sworn by Mr. Hooper, in which he said he believed that Cox had left his dwelling-house with a view to delay his creditors. It ought to be mentioned that a distress had been put in by Mrs. Cox for the rent of the Pimpana property before mentioned, and that a sale was to have taken place on February 24. On those facts the affidavit was made, and both Mr. Hooper and Mr. Hart swore that they believed that the appellant was keeping out of the way. So far as their state of mind is material, that evidence appears to have been accepted by the plaintiff, because there was no cross-examination to test their statements to that effect. The plaintiff was accordingly adjudged insolvent.

The jury found that Hooper did not honestly believe that Cox had departed from his dwelling-house with intent to delay his creditors. Their Lordships think there was no evidence to support this finding, or, if there were a scintilla of evidence, the finding is against the weight of evidence. And they agree with the learned judges in the Supreme Court that on the facts in evidence the circumstances were not such as to be inconsistent with the existence of reasonable and probable cause.

It must always be remembered that the onus, in an action of this kind, is on the plaintiff to prove that there was no reasonable and probable cause. If there was reasonable and probable cause for the belief by Mr. Hooper and Mr. Hart that the appellant was keeping out of the way in order to delay his creditors, then, although the truth may be otherwise and his innocence may be established, still the action will fail. It has been contended that the learned judges in the Supreme Court have usurped the functions of the jury and decided according to their own view of the facts without regard to the verdict of the jury; but their Lordships do not read the judgments in that way. They do not think that the learned judges intended to do or say anything contrary to the law as laid down in the case of *Metropolitan Ry. Co.* v. *Wright.* (1) Bearing in mind the principles there laid down respecting the functions of the jury, and desiring to act on them to the fullest extent, their Lordships agree with the Court below in thinking that the circumstances of this case, as disclosed by the evidence, are not inconsistent with the view that a reasonable man might well draw the inference that the facts were as stated in Mr. Hooper's affidavit.

The judgment of the Court below directs a new trial. It was not asked that judgment should be entered for the defendants, and their Lordships cannot go beyond the judgment that was given. All they can do, therefore, is humbly to advise His Majesty that the appeal should be dismissed. The appellant must pay the costs of it.

Solicitors for appellant: *Nussey & Fellowes.*
Solicitors for respondents: *Slaughter & May.*

(1) 11 App. Cas. 152.

[PRIVY COUNCIL.]

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Nov. 1, 2, 3, 4, 7, 9.
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March 1.

ASSETS COMPANY, LIMITED . . . DEFENDANTS;
AND
MERE ROIHI AND OTHERS . . . . . PLAINTIFFS.
ASSETS COMPANY, LIMITED . . . DEFENDANTS;
AND
WIREMU PERE AND ANOTHER . . . . PLAINTIFFS.

(CONSOLIDATED APPEALS, No. 1.)

ASSETS COMPANY, LIMITED . . . DEFENDANTS;
AND
PANAPA WAIHOPI AND OTHERS . . . PLAINTIFFS.
ASSETS COMPANY, LIMITED . . . DEFENDANTS;
AND
WI PERE AND OTHERS . . . . . PLAINTIFFS.

(CONSOLIDATED APPEALS, No. 2.)

ASSETS COMPANY, LIMITED . . . DEFENDANTS;
AND
TEIRA RANGINUI AND OTHERS . . . PLAINTIFFS.
ASSETS COMPANY, LIMITED . . . DEFENDANTS;
AND
HENI TIPUNA AND OTHERS . . . . PLAINTIFFS.

(CONSOLIDATED APPEALS, No. 3.)

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Law of New Zealand—Transfer of Native Lands—Land Transfer Acts, 1870–1885—*Effect of Registration*—*Native Land Act*, 1873—*Native Lands Fraud Prevention Act*, 1881, *ss.* 4, 6, 15—*Native Land Court Act*, 1894, *ss.* 59, 73—*Fraud in procuring Registration*—*Errors of Procedure in Native Land Courts*—*Orders of Freehold Tenure*—*Memorandum of Transfer indorsed by Trust Commissioner.*

Under the system of land registry introduced into New Zealand in 1860, governed from 1870 to 1885 by the Land Transfer Act of 1870 and its

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

amendments, and afterwards by the Land Transfer Act of 1885, registration is conclusive and confers an unimpeachable title on the registered owner except in certain specified cases, of which fraud is one

The transfer to Europeans of lands held by natives under their native customs was till 1886 regulated by the Native Land Act, 1873, which provided for a judicially ascertained memorial of their ownership, and eventually, in case of a memorandum of transfer by them being judicially approved, for an order of freehold tenure indorsed by the Court on the memorial, the effect of which was to extinguish the native title, confer a new right on the purchaser, and authorize a Crown grant by the Governor. The Land Court had jurisdiction to make this order, by which the district land registrars under the Act of 1870 were bound. By the Native Land Court Act, 1894, s. 73, native customary land was subjected to the Land Transfer Act, 1885, and its owner made absolute proprietor subject to all equities affecting the same. The registration was thereby authorized of any transferee of an interest therein under a transfer made prior to the Act and duly confirmed.

In actions by natives to recover from the appellants three parcels of lands (subject to the Land Transfer Act, 1885) of which they were registered owners in possession, it appeared that the first parcel had been registered in the names of the appellants on production of a warrant or Crown grant dated May 7, 1889; the second under an Act of Parliament (Glasgow Bank Act, 1882) vesting in them, subject to existing liabilities, a title which had been previously registered in the names of the liquidators of the bank; the third on production of certificates of title from the Native Land Court and Crown grants:—

Held, that as the registration had been obtained in each case bonâ fide the effect thereof was conclusive to confer on the appellants a title unimpeachable by the respondents.

By the Land Transfer Acts of 1870 and 1885 the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, is actual, not constructive fraud, brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents.

Gibbs v. *Messer*, [1891] A. C. 248, distinguished.

With regard to the natives' contention that the registration was invalid by reason of the invalidity of the orders of the Native Land Court on which Crown grants or their statutory equivalents had been issued:—

Held, with regard to the first parcel, that serious errors of procedure in the Native Land Court which might have affected the validity of the order of freehold tenure made by it, on which the warrant of May 7, 1889, had been issued, could not avail to invalidate a registered title. It was not the duty of the district land registrar under the Transfer and Native Land Acts to examine its validity, but to act upon it:

Held, with regard to the second parcel, that the Glasgow Bank Act, 1882, under which these lands vested in the appellants, must be read so as to

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work in harmony with the Colonial Acts in force at the time and as conferring upon them the right to procure registration, their transferors having been registered as owners under the Land Transfer Act, 1870 and its amending Acts:

Held, with regard to the third parcel, that the memoranda of transfer having been approved and indorsed by the Trust Commissioner under the Native Lands Fraud Prevention Act of 1881, the effect thereof was that under s. 57 of the Native Land Court Act of 1894 the transfers were confirmed, and accordingly there was nothing to invalidate the appellants' registration.

FIRST-NAMED appeals from a decree of the Court of Appeal (Oct. 29, 1902) in favour of the respondents, declaring the proceedings of the Native Land Court, the provisional register in the Land Transfer Office, the Governor's warrant, and the certificate of title issued thereon, to be void, and ordering the certificate of title issued thereon to be delivered up to the district land registrar at Gisborne to be cancelled, and the register to be amended accordingly, with costs.

Second appeals from a decree of the same Court (Nov. 8, 1902) declaring that the appellants were trustees of the lands in suit for the respondents, who were entitled to mesne profits for such period since June 18, 1879, as was not barred by limitation.

Third appeals from a decree (Oct. 29, 1902) declaring that the instruments by which the appellants claimed were void, and that the registration thereof upon the provisional register and the certificate of title issued to the appellants were also void, and that the certificate should be delivered up to the district land registrar at Gisborne to be cancelled, and that both registers should be amended accordingly. Mesne profits were also directed to be recovered.

The respondents in all three appeals are aboriginal natives of New Zealand. The respondents to the first appeal claimed to be owners according to native custom of a block of land called Waingaromia No. 3, as found in their favour on March 22, 1876, by the Native Land Court, which ordered that a memorial of ownership be issued. But at the time of such finding they alleged that no approved plan of the land within the meaning of ss. 33, 71, and 83 of the Native Land Court Act of 1873 was

in existence, nor was any memorial of ownership under s. 47 actually issued therefor until 1889. The appellants, on the other hand, alleged that one Cooper purchased the block from the native owners by a memorandum of transfer of December 9, 1876, and on December 28, 1876, obtained an order in freehold tenure under the Act of 1873, and on February 5, 1877, provisionally registered this order under the Land Transfer Act of 1874. In April, 1889, they, as mortgagees from Cooper, obtained from the Native Land Court (the Chief Judge signing for John Rogan, a retired judge) a memorial of ownership in favour of the respondents antedated March 22, 1876, caused to be indorsed thereon the certificates provided by ss. 61 and 75 of the Native Land Act, 1873, and the order in freehold tenure all dated December 28, 1876, and in favour of Cooper, and caused the memorial with its indorsements to be provisionally registered. They then obtained from the Governor of the Colony a certificate of title issued to Cooper, and from Cooper a transfer to themselves of the lands in suit, and from the district land registrar a certificate of title thereto. Two suits were then brought, which, so far as material to this appeal, were for the same object—namely, to have the certificate of title called in and cancelled, or to have the appellants declared trustees for the plaintiffs.

The respondents to the second appeal claimed to be owners according to native custom of a block of land called Waingaromia No. 2, declared to be such by a memorial of ownership dated March 22, 1880, issued by the Native Land Court, and that they had neither sold to the appellants nor done any act whereby they ceased to be owners, nor had the memorial been cancelled or destroyed in accordance with law. The Native Land Court had, however, on February 19, 1877, issued a similar memorial, although at that time no approved plan sufficient to give the Court jurisdiction was in existence. The said Cooper had on the previous January 9 obtained a memorandum of transfer, and on June 28, 1877, an order in freehold tenure of the lands in suit, and caused it to be provisionally registered. These proceedings the respondents alleged had been annulled by order of the Governor in January, 1879, i.e., prior to

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March 22, 1880; but the liquidators of the Glasgow Bank, as assignees of Cooper, caused the certificates and order in freehold tenure required by ss. 61 and 75 of the Native Land Act, 1873, to be indorsed on the memorial of March, 1880, and obtained a certificate of title from the district land registrar dated August 28, 1882. On August 15, 1883, they also registered the Glasgow Bank Act, 1882, which vested the land in them.

The respondents to the third appeal claimed that they and others had been found to be owners of the block Rangatira by a memorial of ownership dated May 21, 1875, issued by the Native Land Court; and that after partition an order had been made on May 12, 1886, under the Native Land Division Act, 1882, declaring them to be owners of Rangatira No. 2 (the lands in suit), which order also directed that a Crown grant should issue to them. The memorial was then cancelled, but the order of 1886 is still subsisting, and is provisionally registered. Immediately after this registration the appellants obtained the registration of certain deeds of sale under which they derived title alleged to have been made by the respondents, and on October 23, 1895, obtained a certificate of title from the district land registrar. The history of the transaction between the dates of May 21, 1875, and May 12, 1886, as given in the appellants' case, paragraphs 8 to 12, found by their Lordships to be correct, is as follows: The block was leased after the earlier date to certain sheep-farmers, who in 1878 assigned their lease to the firm Kinross & Graham. In that year and subsequently the respondents and others signed memoranda of transfer of their interests to the firm. These, after inquiry duly made, were indorsed by a Trust Commissioner as approved under "The Native Lands Frauds Prevention Act, 1881." Thereafter the firm remained in possession without payment of rent. In 1883 the lease and the rights under the memoranda of transfer vested in the Glasgow Bank by transfer from the firm to the liquidators, and in the appellants by virtue of the Glasgow Bank Act of 1882. In 1886, after due inquiry by the Land Court, the order of that date was made. The Crown grant was drawn up, but lay in the Native Land Court owing to

non-payment of fees. These were paid in 1895. In July of that year a duplicate was constituted a folium of the provisional register of the district land registrar at Gisborne. At the same time the memoranda of transfer to Kinross & Graham, the transfer from them to the appellants direct, were registered thereon. The Governor then issued his warrant for a certificate of title to the sellers, and the registrar issued his certificate of title to the appellants.

In all three cases the Court of Appeal decided for the respondents.

Haldane, K.C., H. D. Bell, Northcote, and *Smith Clark,* for the appellants, contended in the first appeal that they were entitled to judgment against both sets of respondents. The evidence shewed that they were bonâ fide purchasers for valuable consideration of the lands in suit. They bought from the registered proprietors thereof. They became themselves after their purchase in their turn registered proprietors thereof in good faith without notice of any adverse claim to the vendors' title by the respondents or any other person, and without any notice of any mistake, irregularity, or fraud on the part of any person in relation to the said land. The certificate of title issued to them on registration is under such circumstances conclusive evidence of their title, and bars the respondents' suit: see Land Transfer Act, 1870, s. 19, sub-s. 5; ss. 20, 35, 40, 46, 129; Land Transfer Act, 1885, ss. 55, 56, 66, 189, and 190. The appellants do not come within the exceptions specified in s. 56, and under ss. 189 and 190 their title cannot be attacked on the ground of any infirmity affecting the title of their transferor. The scheme of these Acts is to render the certificate of title conclusive evidence thereof. See also the Native Land Act, 1873, ss. 75 and 76. The certificate to the appellants was issued under the authority of a warrant from the Governor, which has, by virtue of s. 12 of the Land Transfer Act, 1885, the force and effect of a Crown grant, which cannot be impeached except by proceedings in the nature of a scire facias. As registered proprietors, whether on the provisional or completed register, the appellants have a

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title which is unchallengeable except for direct fraud committed by themselves; as bonâ fide purchasers from registered proprietors their title is absolute. Under s. 43 of the Land Transfer Act, 1885, all dealings recorded on the provisional register have when transferred to the final register the same effect as if they had been originally recorded on the final register.

With regard to the contention that registration in this case was invalid because of the invalidity of the orders made by the Native Land Court, which authorized the issue of the Crown grant, they contended that all the procedure prescribed by the Native Land Acts in the matter of purchase of lands from natives had been substantially followed, and that the Native Land Court had investigated all matters relating to the ascertainment and transfer of the native title, and had decided them favourably to the appellants. The order of freehold tenure on which the Governor acted in granting his warrant and the district registrar acted in giving his certificate of title was unimpeachable, and at any rate could not be examined into or disregarded by the registrar. As an order of the Native Land Court it is the record of a Court of exclusive jurisdiction, conclusive in another Court in a collateral proceeding, and not to be questioned by officials in the Registry Office acting under the Transfer Acts. Nor can it now be set aside and the registration cancelled as if it were a nullity. The objections to the procedure are not substantial, and lapse of time has cured them. The appellants and their predecessors have since 1876 been in continuous possession of the lands in suit throughout the whole of the proceedings alleged to be irregular. They have expended large sums of money on improvements, and greatly increased its value as productive pastoral estate, with the knowledge of, but without objection by, the respondents. It was not till 1897 that a caveat was entered and hostilities commenced. In 1900 actions were brought by natives named in the memoranda of ownership of March, 1876, against the appellants, and in previous years by certain other natives in respect of neighbouring blocks of land. They were regarded as representative actions and failed.

See, as regards two of these actions which have been reported, *Matai* v. *Assets Co.* (1); *Hami Tikitiki* v. *Assets Co.* (2) Reference was made as to the effect of registration under the Land Transfer Acts and as to the validity of transfers under the Native Land Acts to *Paraone* v. *Matthews* (3); *Gibbs* v. *Messer* (4); *Creditors' Trustee of Arekatera* v. *Walker* (5); *Attorney-General* v. *Tipae.* (6) The Land Transfer Acts are expressed in very nearly the same terms in all the Australian Colonies as in New Zealand. In South Australia (see *Bonnin* v. *Andrews* (7)) it has been held that ss. 55, 56, and 65 of the Land Act of 1885 protect the appellants' title even if they were the first holders of a certificate of title, instead of holding the still stronger position of bonâ fide registered transferees from registered holders. Further, if the respondents have sustained any loss or damage by the registration of the appellants, their remedy was in an action against the Registrar-General: see Land Transfer Act, 1870, s. 133, and the Act of 1885, s. 178. They are barred from the present action by 3 & 4 Will. 4, c. 27, and, having lain by so long whilst the appellants, believing the property to be their own, expended money thereon, cannot now be allowed to assert any title.

It was also contended in all the appeals that any failures which there might have been to observe all details of procedure in the Land Court under the Native Land Acts was so trivial as not to invalidate the appellants' title, and were errors to which the appellants were not parties and of which they had had no notice.

Further, it was contended with regard to these irregularities in the Native Land Court procedure that they were not proved. As regards the first appeals, it was contended that the map "approved as a sketch plan" produced to the Court in 1876 was an approved map in terms of the Native Land Act, 1873, ss. 33 and 71. The order for a memorial of ownership was a competent order. The absence of a memorial of ownership

(1) (1887) 6 N. Z. L. R. 359.
(2) (1899) 18 N. Z. L. R. 226.
(3) (1888) 6 N. Z. L. R. 744; and in appeal (1889) 7 N. Z. L. R. 528.
(4) [1891] A. C. 248.
(5) (1884) 3 N. Z. L. R. (C.A.) 91.
(6) (1887) 6 N. Z. L. R. 157.
(7) (1878) 12 S. A. L. R. 153.

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following upon the order was not proved, and its existence ought to be presumed. Its absence, however, would not nullify the subsequent order of freehold tenure of December 28, 1876, in favour of Cooper. That was a valid order, the registration of which on the provisional register entitled subsequent purchasers from Cooper to the benefit of all the provisions of the Act of 1885: see ss. 56, 189, and 190. It was contended also that the signature of Macdonald C.J. on behalf of Rogan J., retired, was effectual under s. 67 of the Native Land Court Act, 1886.

As regards the second appeals the same general contentions applied, and in particular it was urged that the order of freehold tenure in favour of Cooper of June 28, 1877, was a valid order, and that the registration thereof upon the provisional register, followed by the registration on the permanent register of the liquidators of the Glasgow Bank, entitled subsequent purchasers to the benefit of the Land Transfer Act of 1885.

As regards the third appeals, they contended that the indorsing as approved of the memoranda of transfer by the Trust Commissioner was equivalent to a confirmation by the Court in terms of the Native Land Court Act, 1894, s. 57; that these memoranda at the time of execution related to land which was customary land within the meaning of that expression as interpreted by the Native Land Court Act, 1894, and that the transfers thereof having been duly confirmed within the meaning of s. 73 of that Act were properly accepted by the registrar as being interests in customary land which were claimed prior to the coming into operation of that Act. Accordingly his issue of a certificate in October, 1895, to the appellants was in conformity with s. 14 of the Land Transfer Act, 1885, and s. 73 of the Native Land Court Act, 1894. By force of this latter section each native owner became the individual owner of his share under the Land Transfer Act subject to all equities affecting his estate or interest. Then the transfer by each native to the appellants having been indorsed under s. 57 must be deemed to have been confirmed by the Native Land Court, to have been validated as an effective alienation, and to have authorized registration.

W. B. Rees, *E. Bray*, and *M. Wimpfheimer*, for the

respondents, contended that they were owners of all the lands subject to the three sets of appeals. In reference to the first block, they are owners according to native custom and have never alienated it. They were owners in 1876 when the Native Land Court purported to adjudicate to that effect. But at the time of that adjudication and of the antecedent hearing it was found by the appellate Court that there was no approved plan of the land in existence within the meaning of ss. 33, 71, and 83 of the Native Land Court Act, 1873. Nor was any memorial of ownership under s. 47 of the Native Land Act, 1873, and executed with the required formalities, issued until 1889. There was no power under this latter Act to issue an interlocutory order for a memorial of ownership. That memorial always lies at the root of native transferable title. Until this case it has never been asserted that, prior to the issue of a memorial, native title is capable of transfer. Accordingly the memorandum of transfer and order in freehold tenure in favour of Cooper in 1876, under which the appellants claim, were, if proved to have been made, absolutely void as against the respondents, and inoperative to convey any rights to Cooper. There was no power to take those steps, which were no doubt the prescribed processes of transfer, until after a memorial of ownership had been properly issued, for until that was done the natives had no title transferable to Europeans. The Native Land Court never made the inquiries required by ss. 59–61, 75, and 83 of the Native Land Act, 1873, concerning any transfer from the respondents or their co-owners. Nor did it ever make any order in freehold tenure of the land under the authority of that Act, or which could possess any force or validity thereunder. At the time when the memorandum and transfer were alleged to have been made, there were many infant native owners for whom no trustees had been appointed under the "Maori Real Estate Management Act, 1867," and under ss. 54 and 55 of the Native Land Act, 1873, and among these infants were many of the respondents. Thus even if the lands had become transferable by virtue of a valid memorial, they had not been effectively transferred. Accordingly it followed that the provisional

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registration in February, 1877, of the said order of freehold tenure under the Land Transfer Act of 1874 was also void and conferred no rights upon Cooper. So also his transfer to the appellants. The memorial of ownership first obtained in 1889 and antedated, and the indorsements thereon of certificates and order in freehold tenure and provisionally registering the same were all void against the respondents, who knew nothing of the transaction, and fraudulent within the meaning of the Land Transfer Act, 1870, and its amendments, and of the later Act of 1885. All these proceedings were not to be classed as mere irregularities capable of being cured, as the appellants, contend, by lapse of time. They are of a nature to destroy the jurisdiction of the Native Land Court, whose authority and proceedings must be strictly regulated by the Acts which establish it. Accordingly the appellants were not as regards this parcel of land in the position of registered bonâ fide purchasers for value from a registered proprietor.

In reference to the second block, there was, besides the objections already stated, the additional objection that, as the result of an order of the Governor in January, 1879, all proceedings before taken in the Native Land Court were annulled, the provisional register was vacated, and all entries thereon cancelled: see s. 59 of the Native Land Act, 1873, and s. 12 of the Land Act of 1874. The respondents rely on the memorial of ownership thereafter issued to them in March, 1880, which has never been cancelled or destroyed in accordance with law. It was pending this order and the proceedings which led up to it that Cooper assigned to the liquidators of the bank by memorandum of transfer dated June 18, 1879. After the order the only steps taken were that the appellants and their vendors procured, without the knowledge of the respondents, indorsements thereon, under ss. 61 and 75 of the Native Land Act, 1873, of the certificates required thereby, and also of an order of freehold tenure in favour of Cooper, under which and without any Governor's warrant their vendors, the liquidators of the Glasgow Bank, obtained a certificate of title, subsequently transferred to the appellants by force of the Glasgow Bank Act of 1882. These certificates and order were indorsed, not merely without

the respondents' knowledge, but without any examination by the Native Land Court under ss. 59, 60, 61, and 75 of the natives interested.

In reference to the third block, the respondents' title was under an order dated May 12, 1886, of the Native Land Court made under "The Native Land Division Act, 1882," declaring them to be owners thereof, and cancelling a previous memorial of ownership in their favour issued under the Native Land Act, 1873, and dated May 21, 1875, relating (inter alia) to the same block. The appellants were holders of a lease dated March 1, 1875, from the respondents and others, owners of a block of land which included those in suit. Registration proceedings were taken, and on October 23, 1895, the appellants obtained their certificate of title without the knowledge or consent of the respondents. They wrongfully obtained it, and accordingly were rightly held by the appellate Court to be trustees thereof for the respondents; for the beneficial title was in them subject only to the appellants' lease. The respondents have never parted with their title under the order of 1886. The deeds of sale under which the appellants claim were not valid alienations, and did not authorize registration.

The same general observations apply to all three cases—that the appellants were not bonâ fide registered owners, and their title was vitiated by fraud (1.) in obtaining orders of freehold tenure in violation of established legal procedure; (2.) in obtaining the property of the respondents by void and ineffectual deeds; (3.) in Cooper obtaining and retaining title to land obtained by a void order. The orders were void as not complying with the statute; the persons conveying had no title to convey; the deeds were void and incomplete; and the absence of memorials of ownership shewed that there was under the Native Land Acts no title in the respondents which they were capable of transferring to Europeans. The evidence pointed to collusion between Cooper and the officials of the Native Land Courts. Reference was made to *Nireaha Tamaki* v. *Baker* (1); *Paraone* v. *Matthews* (2), approved in *Solicitor-General* v. *Mere*

(1) [1901] A. C. 561, 577.
(2) 6 N. Z. L. R. 744; 7 N. Z. L. R. 528.

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Tini (1); *Public Trustee* v. *Registrar-General of Land* (2); *Ex parte Davy* (3); *Rutu Peehi* v. *Davy* (4); *Attorney-General* v. *Tipae* (5); *In re Okirae Block* (6); *Hami Tikitiki* v. *Assets Co.* (7); *Moore* v. *Public Trustee.* (8) The lands in suit had never been brought under the Land Transfer Acts from time to time in force, and consequently the appellants cannot claim title under those Acts. The order of freehold tenure, if duly made by the Land Court in the due exercise of its jurisdiction, would have brought them under the Transfer Acts; but, as already shewn, the memoranda of transfer and the memorials of ownership did not comply with the provisions of the Native Land Act of 1873, and in consequence the whole of the proceedings before the Native Land Court relating to the land the subject of those informal proceedings were coram non judice and void. Further reference on this point was made to *Kawatini* v. *Kinross* (9); *Buchanan* v. *Ngatuere* (10); *Poaka* v. *Ward* (11); *In re Okirae Block.* (6)

Bell replied.

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The judgment of their Lordships was delivered by

LORD LINDLEY. The substantial question raised in each of these three appeals is whether the Assets Company, Limited, has acquired a good title as against the plaintiffs, who are natives, to certain lands in New Zealand. The natives have long been out of possession. The Assets Company is and has been for many years not only in possession, but also registered in the land registers of the Colony as owner of the lands in dispute. The appeals arise out of actions brought in the Supreme Court by a few natives to recover portions of land which formerly belonged to them and many others. In form the actions are not for recovery of possession, but for the rectification of the register and for mesne profits. But whether

(1) (1899) 17 N. Z. L. R. 773.
(2) (1899) 17 N. Z. L. R. 577.
(3) (1888) 6 N. Z. L. R. 760.
(4) (1890) 9 N. Z. L. R. 134.
(5) 6 N. Z. L. R. 157.
(6) (1892) 10 N. Z. L. R. 677.
(7) 18 N. Z. L. R. 226.
(8) (1900) 20 N. Z. L. R. (C.A.) 288.
(9) (1878) 3 N. Z. Jur. (S.C.) 149; affirmed on appeal (1879) 3 N. Z. L. R. (C.A.) 97.
(10) (1885) 3 N. Z. L. R. 255.
(11) (1889–90) 8 N. Z. L. R. (C.A.) 338.

the substance or the form of the actions is regarded, it is obvious that it is for the plaintiffs to establish their claim, and not for the Assets Company to prove their title as if they were themselves plaintiffs out of possession.

The lands in question in the first appeal are known as Waingaromia No. 3; those in question in the second appeal as Waingaromia No. 2; and those in question in the third appeal as Rangatira No. 2.

The title of the Assets Company is derived historically through one Cooper, who many years ago bought the lands in question from the natives. The sales to him were carried out in the Native Land Court. Orders and other documents necessary to enable the Assets Company to be registered as owner under the Land Transfer Acts were obtained, and the Assets Company was registered accordingly as its titles were completed. The company's title as registered owner is impeached by the plaintiffs in all three cases on two grounds, namely, first, that the registration of the company as owner was procured by fraud; and, secondly, that such registration was invalid by reason of the invalidity of the orders of the Native Land Court on which warrants of the Governor, having the effect of Crown grants, were issued, on which warrants the registration was founded.

Before dealing with the facts relied upon for the purpose of establishing these contentions, it will be convenient to examine the statutes relating to the land registry, and to ascertain the legal effect of registration, for if this effect is what the Assets Company contends there is an end of the natives' claim. The Assets Company contends that, in the absence of fraud by the company or its agents, registration is conclusive, and confers a good title on the company; and that defects in the proceedings in the Native Land Court, even if proved, cannot affect the title of the company, although such defects may possibly entitle the natives to compensation for any injury caused to them by improper registration. The question thus raised is one of the greatest importance in the Colony, and, unfortunately, there is a difference of opinion upon it amongst the members of the Supreme Court.

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The system of land registry in New Zealand was introduced in 1860; and from 1870 to 1885 it was governed by the Land Transfer Act of 1870 and Acts amending it passed in 1871, 1874, 1880, and 1885, when it was repealed, but re-enacted with amendments and additions.

The Act of 1870 was, shortly, to the following effect. In every district there was a district land registrar (s. 7) whose duty it was to examine into the title of every person applying for registration, and if satisfied with the title he was to issue a certificate of title and to register it (ss. 19, 23, and 37). His certificate, duly authenticated under his hand and seal, was made evidence in all Courts of Law and Equity (ss. 39 and 139) of the particulars therein set forth, and of their being entered in the register book; and except in cases after provided the certificate was conclusive evidence that the person named in it was entitled to the land mentioned in it for the estate or interest therein mentioned, and no certificate could be impeached on the ground of want of notice or of insufficient notice of the application to bring the land under the provisions of the Act, or on account of any error, omission, or informality in such application or in the proceedings pursuant thereto by the district land registrar.

In connection with this enactment it is material to notice that on registration the applicant's documents of title had to be given up to the registrar to be cancelled and kept in the office (ss. 22 and 23).

The excepted cases mentioned in the clause referred to above were fraud, prior certificates or registered grants, omitted or misdescribed easements, and errors in descriptions of parcels or boundaries (ss. 46 and 129). There was, moreover, another exception in favour of persons adversely in possession when the land was brought under the provisions of the Act and continuing up to the time of granting the certificate (s. 139).

As regards fraud, it was provided (s. 119) that, except in cases of fraud, no person dealing with a registered proprietor need inquire into the circumstances in, or the consideration for, which he or any previous registered proprietor became registered, nor see to the application of purchase-money, nor be affected

with notice direct or constructive of any trust or unregistered interest; and knowledge of any such trust or interest was not of itself to be imputed as fraud.

It was further provided (s. 129) that no action for possession or other action for the recovery of any land should lie against the registered proprietor for the estate or interest in respect of which he was registered except in certain specified cases; and except in these cases the production of a registered grant or certificate was an absolute bar to any such action against the registered proprietor, any rule of law or equity to the contrary notwithstanding. The only excepted case which need be mentioned was thus expressed: "the case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud, or as against a person deriving otherwise than as a transferee bonâ fide for value from or through a person so registered through fraud."

The other excepted cases above referred to do not require further attention.

There was power (s. 19, sub-s. 4) to rectify the register, and to state cases (s. 116) for the opinion of the Supreme Court. The provisions relating to these matters were recast in the Act of 1885, and may be passed over.

Light is thrown on the general scheme of the Act by the provisions (ss. 35 and 130) relating to the Land Assurance Fund. A schedule of charges to be paid by persons applying for registration is given at the end of the Act, and these charges form the fund. Any person deprived of land in consequence of any fraud, or through the bringing of such land under the provisions of the Act or by the registration of any other person as proprietor, or in consequence of any error, omission, or misdescription in any certificate of title or in any entry or memorial in the register book, might bring an action for damages against the person upon whose application such land was brought under the provisions of the Act or such erroneous registration was made, or who acquired title through such fraud, error, omission, or misdescription. This was qualified in certain cases of a transfer to a bonâ fide purchaser for value by making the assurance fund bear the damages sustained. This provision, taken in

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connection with those already referred to, went far to shew that except in the excepted cases the registered certificate was to be conclusive, and that the remedy of persons wrongfully deprived of their property was to obtain damages from the wrong-doer.

So the matter stood under the Act of 1870.

The Act of 1871 (1) introduced a provisional register for dealings with Crown lands before grants for them were obtained and before certificates of title under the Act of 1870 could be issued. The temporary receipts and memorials issued under this Act were made evidence (s. 9); but it was enacted at the end of s. 9 that the estate or interest of a registered proprietor of land on the provisional register should be indefeasible only against the person named in the original receipt, and all persons claiming through, under, or in trust for him. This shews pretty plainly what the effect of being on the permanent register was understood to be.

The Act of 1874 (2) provided for the registration of instruments affecting land granted under the Native Land Acts, but for which no Crown grant had been issued. The machinery of the provisional registry was made applicable to these cases; but otherwise the Act is not important.

The Act of 1880 (3) merely extended the Act of 1870 to some cases to which that Act did not originally apply.

The Land Transfer Act of 1885 consolidated and amended the previous Acts, and although it was not in force when the property in dispute was being dealt with in the Native Land Court, it was in operation when the Assets Company was registered as owner. The system of registration already described was continued, but some important provisions were added, and many of the clauses in the previous Acts were revised and altered. The following are those sections which are important on the present occasion.

Sect. 10 describes the land subject to the provisions of the Act. It includes—

"All land which has already in any manner become subject

(1) Land Transfer Act, 1871, ss. 8, 12. (2) Land Transfer Act, 1874.
(3) Land Transfer Act, 1880, ss. 7, 9.

to the provisions of the Land Transfer Act, 1870, or any Act amending the same, or of the Land Registry Act, 1860."

"All land hereafter alienated, or contracted to be alienated, from the Crown in fee."

"All land in respect of which any order shall hereafter be made under the provisions of any Native Land Act in force for the time being which shall have the effect of vesting such land in any person in freehold tenure."

All the lands in dispute in these appeals appear to their Lordships clearly to come within this s. 10. The certificates of title issued under the Act of 1870, s. 33, and the issue of the Governor's warrants make this point plain.

Sect. 12 makes a certificate of title issued on the Governor's warrant equivalent to a Crown grant, and s. 13 makes the warrant conclusive evidence to the registrar of the matters required to be stated therein.

The mode of applying for certificates of title (ss. 17 et seq. and Sched. II., and ss. 19 and 28) is much the same as before; and the old title-deeds are to be delivered up and cancelled as before. The sections relating to this subject, and the forms in Sched. II., strongly confirm the view that the lands in dispute come within s. 10.

The old provisions respecting the register and the duty to keep it are reproduced (ss. 31, 35, and 36), and a certificate of registration is conclusive evidence of registration. No instrument not registered is effectual to pass any estate or interest in land under the provisions of the Act, but upon the registration of any instrument in manner described the estate or interest specified in such instrument shall pass according to its terms.

The old enactments relating to provisional registration are consolidated (ss. 42, 43, and 44), and provision is made for transferring to the register the memorials and entries on the provisional register as soon as they are finally completed.

Sect. 45 enacts that, subject to any special provisions in the Act, all its provisions shall, so far as circumstances will admit, apply to land on the provisional register and to the registration of instruments and other matters affecting the same. This lets in a number of important sections making the register

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conclusive—e.g., ss. 55, 67, 189, and 190—but it is provided that the estate or interest of a proprietor on the provisional register shall be indefeasible only against the person named in the original receipt or order and those claiming through, under, or in trust for him. This reproduces the last part of s. 9 of the Act of 1871 before referred to. As in the Act of 1870, so in this Act of 1885, the register is made conclusive evidence of the title of the registered proprietor (s. 55) except in cases of fraud, prior certificates of title or registered grants, omissions or misdescriptions of easements, and wrong description of parcels or boundaries, to which must be added adverse claimants in possession at the time of bringing the land under the Act and continuing in such possession at the time of issuing the certificate.

Certificates of title duly signed and sealed are made conclusive evidence (ss. 65 and 66) of title as in the Act of 1870, ss. 39 and 139.

The protection thus afforded is strengthened, as in the Act of 1870, by the preservation in s. 56 of the enactment against bringing actions against registered proprietors, i.e., s. 129 of 1870, already noticed.

Further protection is afforded by the reproduction of s. 119 of the Act of 1870 relating to notice and knowledge of unregistered interests, and there is a new clause specially protecting bonâ fide purchasers or mortgagees from registered proprietors (ss. 189 and 190).

The provisions relating to the correction of certificates of title and of the register have been recast, and the powers of the registrar in this respect have been enlarged (ss. 68–71). Subject to regulations under the Act, he is empowered to correct errors and supply omissions, and to require certificates of title or other instruments to be delivered up to be cancelled or corrected if issued in error, or if they contain any misdescription of land or boundaries, or if fraudulently or wrongfully obtained. He can apply to the Supreme Court to compel people to appear before him and to deliver up documents as required. Appeals lie from his decisions to the Supreme Court (ss. 191 et seq.). Large, however, as these powers are, it has

been decided that they cannot be exercised to the prejudice of a registered bonâ fide purchaser: *In re Macarthy and Collins.* (1) Their Lordships have not to consider his power, but they doubt whether the registrar can set aside a Crown grant or its statutory equivalent; they are disposed to think that his power to rectify is limited to some fraud or other cause intervening after the Crown grant or equivalent instrument which originally brought the land on the register.

There does not, moreover, appear to be any power conferred on the Supreme Court to cancel or correct any certificate of title or entry on the register unless applied to by the registrar or on appeal from him, except where land or some estate or interest therein is recovered by some proceeding in that Court from a registered proprietor. In such a case, if the proceeding is not expressly barred—i.e., if having regard to s. 56 the plaintiff is entitled to recover—the Supreme Court or judge can direct the registrar to cancel a certificate or entry and to substitute another for it (s. 73).

These provisions confer upon the Supreme Court jurisdiction to entertain such actions, and to make such orders as those which give rise to these appeals, if the plaintiffs are entitled to recover the land. Whether those orders have been rightly made is a different question.

The provisions (ss. 177 et seq.) relating to the insurance fund are also reproduced, but are considerably altered and extended. Any person sustaining loss through any omission, mistake, or misfeasance of the registrar or any of his officers, and any person deprived of any land through its being brought under the Act, or by the registration of any other person as proprietor, or by any error in any certificate of title or in any entry or memorial of the register, or who has sustained any loss by the wrongful inclusion of land in any certificate, and who by that Act is barred from bringing an action for possession or other action for the recovery of the land, may obtain compensation out of the fund. Provision is also made for the recovery by the registrar of any money paid out of the fund as compensation for loss occasioned by fraud. Certain cases are excluded

(1) (1901) 19 N. Z. L. R. 545.

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from compensation out of the fund, but they are not material on the present occasion. Actions for the recovery of compensation out of the fund are barred after the lapse of six years, with an extension in case of disability (ss. 185 and 187).

The acquisition by Europeans of lands held by natives under their native customs was regulated by the Native Land Act, 1873. The procedure to be followed is there fully set out. The proceedings commenced by bringing in a claim for investigation (s. 33) of the native title; and if the title of the natives was found satisfactory a memorial of their ownership (s. 47) was drawn up and signed by the judge, and sealed with the seal of the Court and enrolled. It might be appealed against (s. 58); but, subject to appeal, a certified copy of the memorial, signed by a judge of the Court and sealed with its seal, was not only evidence of the facts stated in it, but was made "conclusive of the ownership of the land described therein according to native custom" (s. 51). Leases for not more than twenty-one years could then be granted, but native land could not be otherwise dealt with except under the direction of the Court (ss. 48, 59, 60, and 87). Sect. 87 is express on this point. In the case of a sale, a memorandum of transfer by the sellers to the purchasers was signed and submitted to the judge, and it was his duty to satisfy himself that everything was in order, and that the proposed sale was fair to the natives, and that the consideration was adequate and was paid. The memorandum of transfer was an important document, but it was not binding even as an agreement (s. 87). On being satisfied that all was right, the judge (s. 61) was to draw up a certificate of the completion of the sale, and indorse it on the memorial of ownership with a declaration as thereinafter mentioned to the effect that the purchaser should thenceforth hold the land as freehold. This document was then to be sent by the judge to the Governor with a recommendation for a Crown grant. By s. 75 the judge of the Native Land Court was authorized, by an order signed by him and under the seal of the Court, to declare that the land should be held for the future in freehold tenure, and it was enacted that such land should be held as freehold accordingly, anything thereinbefore provided notwithstanding, and

from the date of such order the native title over the land comprised in such order should be extinguished; and the Governor was empowered at any time thereafter to issue a Crown grant for any such land. The effect of such an order, commonly called an "Order of freehold tenure," was not to transfer the title of the natives, but to extinguish it, and to confer a new right on the purchaser.

This Act of 1873 was followed by several amending Acts, and was repealed by the Native Land Court Act, 1886.

Their Lordships do not consider it necessary at present to allude further to the Native Land Acts. The important matters to be borne in mind are: (1.) That the Native Land Act, 1873, was passed after the Land Transfer Act, 1870, and that orders made by judges of the Native Land Court would have to be acted on by district land registrars; (2.) that the Native Land Court was specially created to watch over and protect the natives against being unfairly dealt with by Europeans in transactions relating to lands; and that the jurisdiction of that Court to sanction sales and make orders vesting lands in purchasers for estates of freehold cannot be denied. How far errors in procedure affect the validity of orders made by the Court in the exercise of its jurisdiction is one of the questions raised by these appeals.

Their Lordships' attention was called to many decisions on the Native Land Acts and the Land Transfer Acts, and some of them are important. The memorial of ownership, which is a very important document and the root for future purposes of the title of the natives mentioned in it, has been held to be conclusive: *In re Okirae Block.* (1)

A memorandum of transfer has been held to have no operation as a transfer or as an agreement until approved by the Native Land Court, but after such approval it becomes binding: *In re Kotarepaia Block* (2); *Creditors' Trustee of Arekatera Te Wera* v. *Walker* (3); *Paraone* v. *Matthews.* (4)

Orders of freehold tenure have given rise to differences of

(1) 10 N. Z. L. R. (S.C.) 677.
(2) 3 N. Z. L. R. (S.C.) 54.
(3) 3 N. Z. L. R. (A.C.) 91.
(4) 6 N. Z. L. R. 744; 7 N. Z. L. R. 528.

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opinion. There are several decisions to the effect that, as between private individuals, they are conclusive in favour of bonâ fide registered purchasers, namely: *Attorney-General* v. *Tipae* (1), *Matai* v. *Assets Co.* (2), *Hami Tikitiki* v. *Assets Company and District Land Registrar* (3), and *Public Trustee* v. *Registrar-General of Land* (4), mentioned below. Indeed, except the decisions under appeal their Lordships have found no case to the contrary. There are cases, however, in which orders of the Native Land Court have been impeached and held void, and great reliance was placed upon them by the counsel for the respondents. They were as follows:—

In *Te Raihi* v. *Grice* (5) the Native Land Court made an order and then cancelled it, and made another on which a Crown grant issued. The Supreme Court, in an action to which the Attorney-General was a party, declared the Crown grant void on the ground that the order on which it was obtained was void, the Native Land Court having had no power to cancel its first order. This case turned on an Act of 1867, and not on any of the statutes which have to be considered on the present occasion. No registered title was in question then.

Seymour v. *Macdonald* (6) was an application for a mandamus which was very properly refused. The last part of the headnote, namely, that the certificate, if granted, would be invalid, does not appear in the judgment, and can only mean that the applicant for it could not properly make use of it.

Poaka v. *Ward* (7) was an application for a prohibition to stay a partition amongst natives. There was no question of registered title. But the Court held that the proper steps to obtain a partition had not been taken, and a prohibition was granted.

Paraone v. *Matthews* (8) was really a case of fraud, and might have been shortly disposed of on that ground. The

(1) 6 N. Z. L. R. (S.C.) 157.
(2) 6 N. Z. L. R. (S.C.) 359.
(3) 18 N. Z. L. R. 226.
(4) 17 N. Z. L. R. 577.
(5) (1886) 4 N. Z. L. R. (A.C.) 219.
(6) (1887) 5 N. Z. L. R. (A.C.) 167.
(7) 8 N. Z. L. R. 338.
(8) 6 N. Z. L. R. 744; affirmed 7 N. Z. L. R. 528.

defendants knew they had no title when they got on the register. The case, however, was decided on the ground that the proceedings were null and void rather than on the ground of fraud.

Solicitor-General v. *Mere Tini* (1) was a somewhat similar case, but the Crown there applied to have a certificate of title followed by registration cancelled. This case does not shew that if the suit had been between private individuals it would have succeeded.

Rutu Peehi v. *Davy* (2) was a decision on points of law raised before trial. The district land registrar was a party, and compensation out of the assurance fund was claimed. It is obvious that this involved a much wider inquiry than an action against a registered owner; and in that very case no decision was given to the prejudice of the only bonâ fide purchaser.

Public Trustee v. *Registrar-General of Land* (3) was, again, an application for compensation out of the assurance fund on the ground that the Crown had been wrongfully deprived of certain reserve lands vested in it. The title of the registered purchaser was admitted to be unimpeachable.

No one of these cases can be regarded as a clear decision adverse to the Assets Company on these appeals unless fraud be established against it.

The Assets Company procured itself to be registered in the following way:—

As regards the lands known as Waingaromia No. 3, the company produced to the district land registrar a warrant from the Governor of the Colony on May 7, 1889.

As regards Waingaromia No. 2, the company bought from the liquidators of the Glasgow Bank, who were already on the register, and produced an Imperial Act of Parliament vesting the assets of the bank in the company.

As regards Rangatira No. 2, the Assets Company produced certificates of title from the Native Land Court and Crown grants, and it was provisionally registered. Its title depends

(1) 17 N. Z. L. R. 773. (2) 9 N. Z. L. R. (S.C.) 134.
(3) 17 N. Z. L. R. 577.

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on the Native Land Court Act, 1894, which has no application to the other cases.

As regards Waingaromia No. 3, the Assets Company rely primarily on the absence of fraud and on the conclusiveness of their registered title. They raise other defences if their main contention fails. The question of fraud will be considered later; but apart from fraud the respondents contend that the warrant was invalid because it was founded on an invalid order of freehold tenure; that this order was invalid because it was founded on an invalid memorandum of transfer from the natives; that this was invalid because it was not founded on any memorial of title, but only on an order for a memorial, and that this order was worthless because there was no certified plan before the Court when the order was made.

The alleged invalidity of the memorandum of transfer itself is based on evidence of irregularities in the signatures to it. It is alleged that some natives who were interested did not sign it, and that others who were minors were not properly represented, and other irregularities are suggested. Having regard to the lapse of time and the long undisturbed possession and to what subsequently took place, their Lordships think they ought not to entertain objections of this character to the memorandum of transfer. They must assume that Rogan J. performed his statutory duty and satisfied himself that the memorandum was substantially in order.

The objection to the order of freehold tenure made by him is more serious. It is admitted that what is described as a sketch plan was before the Court, and that it was in all particulars identical with the plan which was afterwards approved by the proper officer, except that it was not certified. The judge could not, therefore, then make a memorial of ownership, and in making his order for a memorial, which was dated December 27, 1876, he made a note in pencil—"Order not signed to stand over till plan is certified to." It is not denied by the appellants that the judge could not make an order of freehold tenure until a memorial of ownership had been signed and enrolled, upon which the order could be indorsed. And their Lordships think that Rogan J.'s order of freehold tenure must

be regarded as provisional only until the plan should be certified. The important point for observation is that the judicial proceedings before Rogan J. were complete, and upon the production of the plan, with the proper certificate on it, nothing more was required than the purely ministerial act of signing the formal documents necessary for carrying into effect the result of the proceedings before the judge. No further exercise of judicial discretion was required, and on production of the certificate to the plan Rogan J. might have signed the formal documents at any time.

Macdonald C.J. had express statutory power conferred upon him in 1886 (1) to act for Rogan J. and to complete what he had left uncompleted; and it appears to their Lordships that Macdonald C.J. had jurisdiction to do what he did. It will be remembered that Cooper, or those claiming under him, had throughout been in possession. This, no doubt, was the reason why Macdonald C.J. thought it right to antedate his orders. Their Lordships do not overlook the fact that Macdonald C.J. was correcting a mistake made by Brookfield J. in 1884, when he ordered a Crown grant or certificate of title to be issued to the natives. This order, which was never signed, must have been made in ignorance of Cooper's position. The respondents attach importance to this order, and in fact rely upon it as shewing their title to sue. This, however, places them in a difficulty, for Brookfield J.'s order presupposes a memorial of ownership in the natives (2), and would be worthless without it, and yet the only memorial they had to rely upon was the order for one made by Rogan J. in 1876, which they now contend was itself worthless.

But realizing, as their Lordships do, the difficulties arising from Rogan J.'s failure to complete the course of procedure prescribed by the Native Land Acts, their Lordships are of opinion that the registered title of the Assets Company to Waingaromia No. 3 can only be impeached for fraud. It was strenuously contended by counsel for the natives that the

(1) See Native Land Court Act, 1886, s. 67, and ss. 52 to 64, and 115 to 117.

(2) Native Land Division Act, 1882, s. 10.

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proceedings in the Native Land Court were not only irregular, but that the irregularities were of such a nature as to affect the jurisdiction of the Native Land Court, and to render its proceedings and its order of freehold tenure absolutely null and void on the ground that it was coram non judice. The same contention assumed another shape when relied on to shew that the lands in question were never brought under the Land Transfer Act, 1885, so as to render its provisions applicable to them.

Their Lordships have very carefully considered the judgments delivered in the Court of Appeal upon this part of the case, as well as the very able and exhaustive arguments of the learned counsel for the native claimants; but their Lordships are unable to concur in the view taken by the majority of the Court, and they concur in that taken by Williams J., who dissented from the judgment. The sections making registered certificates conclusive evidence of title are too clear to be got over.

In dealing with actions between private individuals, their Lordships are unable to draw any distinction between the first registered owner and any other. A registered bonâ fide purchaser from a registered owner whose title might be impeached for fraud has a better title than his vendor, even if the title of the latter could be impeached by the Crown. The reasons for arriving at this conclusion are so clearly given by Williams J. that their Lordships do not think it necessary to do more than adopt them and supplement them by a few remarks on some of the arguments addressed to them, and to which they are unable to assent. It is to be observed that in *Solicitor-General* v. *Mere Tini* (1) the title of the first registered owner was successfully impeached by the Crown. But in *Public Trustee* v. *Registrar-General of Land* (2) his title was admitted to be unimpeachable. These cases are noticed above.

Their Lordships are not prepared to hold that a Crown grant, or a warrant, or a certificate having the statutory effect of a Crown grant, can be impeached except at the instance

(1) 17 N. Z. L. R. 773. (2) 17 N. Z. L. R. 577.

of the Crown, or, at any rate, in an action to which the Crown is a party. The power of the Crown to set aside its own grant or its equivalent has not to be considered on the present occasion, and their Lordships do not, therefore, express any opinion upon it.

It by no means follows that errors in procedure, even in matters which in one sense affect jurisdiction, need be noticed, or ought to be noticed, by other persons whose duty it is to act on orders brought to them. It is not their duty to attend to such matters; if it were, their action would be paralyzed. What they have to look to is the order, and, if that is good on the face of it, it is their duty to act upon it, and it must be treated as a sufficient foundation for what they do. Not only are they protected from liability if the order turns out to have been improperly obtained, but if what they do under it is made conclusive on questions of title, a title which might be otherwise impeachable must be treated as valid.

The cases of *Matai* v. *Assets Co.* (1), *In re Aldridge* (2), and *Hami Tikitiki* v. *Assets Co.* (3) were decided, and in their Lordships' opinion rightly decided, on this principle. Having regard to the Land Transfer Acts and the Native Land Acts, their Lordships are of opinion that it was not the duty of a district land registrar to examine into the validity of a Crown grant, nor to inquire how a Governor's warrant had been obtained, nor to inquire into the proceedings in the Native Land Court culminating in an order of freehold title. The Acts shew that these documents may be assumed to have been properly obtained, and may be safely acted upon by the district land registrars and by other persons acting in good faith.

The difference between want of jurisdiction over persons and subject-matter and wrong procedure in a Court having such jurisdiction will be found discussed in *Pemberton* v. *Hughes* (4), where the Court of Appeal in England had to consider the validity of a divorce in Florida alleged to be coram non judice and void by reason of errors in procedure. The Court of

(1) 6 N. Z. L. R. (S.C.) 359.
(2) (1893) 15 N. Z. L. R. 361.
(3) 18 N. Z. L. R. 226. See also 17 N. Z. L. R. 593.
(4) [1899] 1 Ch. 781.

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Appeal held that such matters ought not to be regarded by a foreign tribunal called upon to recognise the Florida decree.

It is said that *Gibbs* v. *Messer* (1) shews that registered titles may not be conclusive even in favour of a bonâ fide registered purchaser from a registered owner. The case, no doubt, does shew that such a case may occur. The case was one of fraud and forgery. A transfer from a registered owner to a non-existent person had been fraudulently procured and registered, and a fictitious transfer from that fictitious transferee to a bonâ fide mortgagee was afterwards registered. In a suit by the first registered owner against the registrar, the registered mortgagee and the perpetrator of the fraud, the name of the first registered owner was ordered to be restored to the register by this Board. The Supreme Court of Victoria had held that the true owner had lost her property, but was entitled to damages out of the compensation fund. The appeal was by the registrar from this decision. This Board held that, as as there was, in fact, neither any transferee from the first registered owner, nor any transferor to the registered mortgagee, there was nothing to deprive the first registered owner of her property—nothing, in fact, on which the subsequent registrations could operate; and those registrations were accordingly ordered to be cancelled. Lord Watson, in his observations on the protection given to bonâ fide purchasers, points out that a bonâ fide purchaser from a registered owner is in a better position than a first registered owner whose title may be impeached for fraud. But there is nothing in his judgment in favour of the view that an original registered owner, claiming through a real person, does not get a good title against every one, except in the cases specially mentioned in the Act, fraud being one of them.

Then it is contended that a registered owner may hold as trustee and be compelled to execute the trusts subject to which he holds. This is true; for, although trusts are kept off the register, a registered owner may not be beneficially entitled to the lands registered in his name. But if the alleged cestui que trust is a rival claimant, who can prove no trust apart

(1) [1891] A. C. 248.

from his own alleged ownership, it is plain that to treat him as a cestui que trust is to destroy all benefit from registration. Here the plaintiffs set up an adverse title and nothing else; and to hold in their favour that there is any resulting or other trust entitling them to the property is, in their Lordships' opinion, to do the very thing which registration is designed to prevent. Their Lordships cannot give effect to the ingenious arguments addressed to them on this point; nor can they adopt the case of *Solicitor-General* v. *Mere Tini* (1) as an authority which ought to be followed in these appeals.

The conclusions thus arrived at really dispose of all three appeals, except so far as they are based on fraud. But before dealing with the charges of fraud their Lordships will shortly allude to the special grounds relied upon in the second and third appeals.

In Waingaromia No. 2 the liquidators of the Glasgow Bank, who claimed through Cooper, were registered as owners on the provisional register, and in August, 1882, they obtained a certificate of title from the district land registrar.

By an Imperial statute, the City of Glasgow Bank (Liquidation) Act, 1882 (2), all the assets of the Glasgow Bank were vested in the Assets Company on their obtaining a discharge from the liquidators for the purchase-money, and on the recording of such discharge as mentioned in the Act. The purchase-money was to be paid on or before October 1, 1882, but it was not in fact all paid before December, 1882, and the statutory vesting did not take effect until then. On August 15, 1883, the Glasgow Bank Act was produced to the district land registrar, and he indorsed on the liquidators' certificate of title a transfer to the Assets Company and registered it. The Act vesting the assets in the company vested them subject "to the existing charges, debts, engagements, and liabilities specifically affecting the same in the hands of the bank or the liquidators," and the Court below has held that these words had the effect of overriding or controlling the Land Transfer Acts of the Colony. Their Lordships are unable to concur in this view. There is nothing in

(1) 17 N. Z. L. R. 773.

(2) 45 & 46 Vict. c. 152, ss. 3, 4, and Sched. II.

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the Glasgow Bank Act to shew that interference with the Colonial Land Acts was ever contemplated, still less that those Acts were to be overridden. The general vesting clause, when applied to lands in the Colony, must be read so as to work in harmony with the Colonial Acts, and in effect as conferring upon the Assets Company the right to procure themselves to be registered according to the laws of the Colony; and if that registration gave them rights in the Colony beyond what they might have without it, there is nothing in the Imperial Act to deprive them of those rights.

Then it was ingeniously argued that these particular lands were not bought from the liquidators on the faith of their being registered owners, and that the Land Transfer Acts did not therefore apply. But although the agreement to buy the assets of the Glasgow Bank in block was not based on the Colonial Land Transfer Acts, the completion of the purchase of these particular lands was based upon them, and nothing more can be reasonably required.

In 1883 the Land Transfer Acts in force in the Colony were the Act of 1870 and the Acts amending it. But the reasons for which registration under the Act of 1885 confers a good title apply also to the Acts in force in 1883, and although the liquidators were only themselves entered as owners on the provisional register, a good transferable title had been acquired by them, and the subsequent registered title of the Assets Company cannot be disturbed.

Passing now to Rangatira No. 2, the Assets Company rests its title on the fact that in October, 1895, it obtained a certificate of freehold title under the Land Transfer Act, 1885, and is registered as owner under that Act. The title is impeached for fraud and for irregularities in the Native Land Court, and especially for the invalidity of the memoranda of transfer from natives, on which the title is founded. Fraud is denied, and will be passed over for the present. Their Lordships have already expressed their view of the conclusiveness of the register. But as the objection to the validity of the transfers was argued at great length and prevailed in the Court of Appeal, their Lordships think it right to express their opinion upon it. The

history of the case is complicated. It is fairly and correctly stated in the appellants' case, paragraphs 8 to 12, and their Lordships do not think it necessary to repeat it in detail. The important points are that in 1875 the lands in question were brought by the natives under the Native Land Acts, when a memorial of ownership was issued to them. Their title was then investigated and determined. They obtained a statutory title, and ceased to hold solely by their old custom or usage. In the same year (1875) the natives granted a lease for twenty-one years. Afterwards, between 1878 and 1883, most of the natives signed memoranda of transfer of all their interests to the then lessees. These memoranda of transfer are those now impeached. No orders of freehold tenure followed them. But in May, 1886, they were produced to, and approved and indorsed by, the Trust Commissioner, and his duty was, by the Act of 1881 (1), to protect the natives in their dealings with Europeans, to see that everything was fair, and that the purchase-money was really paid. Without his certificate no transaction with the natives could be registered. No rent was ever paid to the vendors after this. In 1886 partition proceedings were pending between the natives, and the lands known as Rangatira No. 2 were allotted to those adult natives who had sold their interests as above mentioned, and in May, 1886, an order was made for the issue of a Crown grant of this block to those sellers. Other blocks were allotted to the other natives, and Crown grants were ordered to be issued to them, and the memorial of ownership issued in 1875 was then cancelled. All this was done before August, 1886, when two important Acts were passed. Mr. Graham, who represented the purchasers, was a consenting party to all these proceedings, which were really taken, not only to effect a partition between the natives, but also to facilitate the completion of the purchaser's title.

These orders for Crown grants were made, but were retained in the office as the fees for them were not paid.

Then the Native Land Court Act, 1886, and the Native Land Administration Act, 1886, were passed. The former Act by s. 115 repealed the Native Land Act, 1873, but enacted that

(1) Native Lands Frauds Prevention Act, 1881, ss. 4, 6, 15.

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incompleted procedure might be completed either under the new Act or under the old. This Act was amended in 1888 and 1889.

By the Native Land Administration Act, 1886, further provision (s. 24) was made for the protection of natives and for the completion of incompleted transactions. This Act did not come into operation until January, 1887, and it was repealed in 1888. (1)

The Assets Company did not complete its title under either of these Acts.

So matters stood when the Native Land Court Act, 1894, was passed. At that time the lease and the interests of the native sellers, which had been bought as above stated, had become vested, first in the liquidators of the Glasgow Bank, and afterwards in the Assets Company, by virtue of the Imperial statute which has been already referred to, and in July, 1895, the company obtained the registration on the provisional register of the transfers from the natives and its other documents of title, and in October following obtained, first, a warrant from the Governor for the issue of a certificate of title to the native sellers, and, lastly, from the district land registrar, a certificate of the company's ownership under the Act of 1885, and registration of the company as owner accordingly.

The contention of the Assets Company is that the Act of 1894 cured all defects, and enabled it to acquire a complete title and to procure itself to be registered as owner. The contention on the other side is that the transfers had become pure waste paper, and that there was no title to register.

It will be convenient first to consider the Act of 1894. It repealed the Native Lands Frauds Prevention Act, 1881, to which reference has already been made, and also the several Native Land Court Acts of 1886, 1888, and 1889.

The Act of 1894 enacts (s. 57) that every instrument indorsed by a Trust Commissioner as approved in terms of the Act of 1881, is to be deemed to have been confirmed by the Court within the meaning of the Act of 1894, and no further confirmation is required. By s. 73 all land which was customary

(1) Native Land Act, 1888, s. 3.

land when the Act of 1894 came into operation (and by s. 2 Rangatira No. 2 was such land) became subject to the Land Transfer Act, 1885 (already referred to), and every native owner of such land, subject to all equities affecting his interest therein and to all existing restrictions on alienation thereof, is to be deemed the proprietor thereof under the said Act for an estate in fee simple in possession. Further, by the same s. 73, any person claiming to have acquired an interest in any such land by virtue of any alienation prior to the coming into operation of the Act of 1894 may apply to the Court to have such alienation confirmed; and upon confirmation thereof the claimant becomes entitled to be registered under the Act of 1885 as proprietor of the estate or interest acquired.

This latter part of s. 73, above referred to, cannot mean that cases that fall within s. 57, and which require no confirmation, are to be again confirmed. The latter part of s. 73 can only apply to incomplete transactions not approved and certified by the Trust Commissioner. This being the case, their Lordships are unable to see why s. 57 does not apply to these memoranda of transfers from the natives which the Trust Commissioner did approve and certify, and their Lordships can see nothing substantially wrong in the procedure which resulted in the registration of the company.

To treat the memoranda of transfer as waste paper appears to their Lordships to go a great deal too far. They were not valid as transfers, but they were the first step for obtaining such transfers, and entitled the parties to take the necessary proceedings for completing them.

The repeal of the Act of 1873 led to difficulties which do not appear to have been removed by subsequent legislation prior to 1894. This is apparent from *Poaka* v. *Ward* (1), already referred to. The Act of 1894 was apparently passed to remedy them.

The true effect of the Act of 1894, ss. 57 and 73, was, in their Lordships' opinion, to entitle all the selling natives to their shares in the lands sold, but subject to all equities affecting the same. These equities included the right of the Assets

(1) 8 N. Z. L. R. 338.

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Company to have the transfers which had been approved by the Trust Commissioner carried out and completed. There may have been irregularities in the procedure adopted, but their Lordships are of opinion that the Act of 1894 put matters right, and that there was nothing wrong in substance—nothing to affect the validity of the final certificate and registration of the company as owner.

Passing now to the question of fraud, their Lordships are unable to agree with the Court of Appeal. Sects. 46, 119, 129, and 130 of the Land Transfer Act, 1870, and the corresponding sections of the Act of 1885 (namely, ss. 55, 56, 189, and 190) appear to their Lordships to shew that by fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud—an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon.

In dealing with Colonial titles depending on the system of registration which they have adopted, it is most important that the foregoing principles should be borne in mind, for if they

are lost sight of that system will be rendered unworkable. Their Lordships are keenly alive to the necessity of vigilance to protect natives against unfair and oppressive dealings on the part of Europeans; but on the other hand it is equally important not to disturb registered titles of bonâ fide purchasers, especially when accompanied by long possession and large outlays.

It was urged by counsel that the decision of this Board in *Gibbs* v. *Messer* (1) shews that it is not in all cases essential to bring fraud home to the registered owner. This is true; but the case is not really in point. As already explained, in *Gibbs* v. *Messer* (1) two bonâ fide purchasers were on the register, and the case turned on the non-existence of any real person to accept a transfer and get registered himself, and then to make a transfer to some one else. Moreover, forgery is more than fraud, and gives rise to considerations peculiar to itself.

In the first appeal, Waingaromia No. 3, the fraud charged is fraud by the Assets Company in obtaining a warrant from the Governor and a certificate of title from the district land registrar.

In the second appeal, Waingaromia No. 2, various frauds on the natives are charged against Cooper and the liquidators of the Glasgow Bank, who purchased from him. There is no definite charge of fraud by the Assets Company. The only charge against the company is that the company obtained from the district land registrar an indorsement of the transfer from the liquidators to the company, and that the obtaining of that indorsement was fraudulent and void as against the plaintiffs.

In the third appeal, Rangatira No. 2, the fraud charged is, again, that frauds were committed by other people, and that the obtaining and retaining by the company of a certificate of title from the district land registrar was fraudulent and void as against the plaintiffs.

The evidence of fraud by the company entirely breaks down. The evidence shews that in all these cases the agents of the Assets Company in the Colony took to the registrar and got

(1) [1891] A. C. 248.

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him to register certain documents which according to their purport and effect entitled, and which they believed did in fact entitle, the company to be registered as owners. There is no evidence whatever of any fraudulent statement made by the company's agents to the registrar, nor of any bribery, corruption, or dishonesty in the matter.

Their Lordships cannot help thinking that the equitable doctrines of constructive fraud have weighed too much with the Court of Appeal and have induced it to impute fraud to the Assets Company, although no dishonesty by the company or its agents, or by the liquidators of the City of Glasgow Bank, was really established. Nor is there any proof whatever that the liquidators or the Assets Company dishonestly refrained from making inquiries which an honest purchaser would have made.

The conclusions thus arrived at dispose of all these appeals. Their Lordships do not, therefore, think it necessary to give any opinion on several other defences to these actions which were raised in the Court of Appeal, and relied upon by counsel for the appellants in their argument before this Board. Their Lordships refer to the defences based on the defective title in the plaintiffs, the absence of other parties, the Statute of Limitations, the effect of long possession and large outlays on the lands sought to be recovered, and the effect of decisions in former unsuccessful actions by natives suing on behalf of themselves and others. Their Lordships base their judgment on the conclusiveness of the registered title in the absence of fraud.

In upholding the title of the appellants on this broad ground it is satisfactory to find that their Lordships are not disturbing, but upholding, the views which had been until recently taken and acted upon in the Colony for many years in actions brought against bonâ fide purchasers on the register. The same view has been taken in South Australia, as is shewn by *Bonnin* v. *Andrews*. (1)

The conclusion of the whole matter is that their Lordships will humbly advise His Majesty to allow these appeals and to

(1) 12 S. A. L. R. 153.

reverse the judgments appealed from, with costs, and to enter judgment in each action for the defendants, the Assets Company, with costs, and the costs of each appeal must be borne by the respondents thereto.

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Solicitor for appellants: *A. E. Baker.*
Solicitors for respondents: *Baker & Nairne.*

[PRIVY COUNCIL.]

BOMBAY-BURMAH TRADING CORPORATION, LIMITED . . . . . APPELLANTS;

AND

DORABJI CURSETJI SHROFF . . . RESPONDENT.

J. C.* 1904 *Nov.* 17, 18; *Dec.* 19.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Law of Companies—Shareholder only to be Proxy—Nomination of unqualified Proxy—Disqualification removed before Proxy is used.

Where one of a company's articles of association provided that "no person shall be appointed or . . . . have authority to act as a proxy who is not a shareholder of the company":—

Held, that on its true construction it is no objection to a proxy duly lodged that an unqualified person is named therein, provided that the qualification exists when the proxy is lodged and continues when it is used:

Held, further, that as the articles did not require the shareholder using the proxy to be literally "named" therein, the proxy could not be objected to if he were sufficiently described for all business purposes, as for instance a member for the time being of a specified firm.

APPEAL from an order of the High Court (Oct. 17, 1902) dismissing a petition presented under the Indian Companies (Memorandum of Association) Act, 1895, by the appellants for the confirmation by the Court of certain alterations of the company's objects.

Those alterations were proposed to be effected by a special resolution purporting to have been passed and confirmed at

* *Present:* LORD MACNAGHTEN, LORD LINDLEY, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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meetings of the appellant company held on May 29 and June 19, 1902.

The High Court found that by reason of the invalidity of certain proxies given under the circumstances stated in their Lordships' judgment the special resolution was never validly passed. The respondent had objected to their validity. In the High Court argument was confined to two lots of 124 and 192 votes given to Macaulay, the chairman of the meeting, as proxy for absent shareholders. The Indian Companies Act, s. 77, which is for all material purposes a re-enactment of s. 51 of the Imperial Companies Act, 1862, requires a special resolution to be passed by a three-fourths majority of members present in person or by proxy; which in this instance was not secured if the votes in question were invalid.

Haldane, K.C., Levett, K.C., and *Armitstead*, for the appellants, contended that the votes were valid. They referred to various articles of association, including art. 65, which provides that no person can act as a proxy who is not a shareholder; art. 64, which gives a prescribed form of proxy; art. 66, which assumes that he is named therein. They contended that the proxy in dispute was valid, because Macaulay was duly nominated as proxy by the power of attorney in 1881 and was qualified as a shareholder at the time he acted under it by voting. Art. 64 was only permissive and not directory as to the form of the instrument. There is no article which prohibits the appointment of a person to be ascertained at a future time, provided that when he acts he is qualified. Macaulay was sufficiently designated as a partner for the time being of a specified firm; in fact, the chairman of the company is by art. 71 directed to be a partner for the time being of the same firm. It was the settled practice of the company to treat powers of attorney so drawn as valid instruments of proxies.

Cohen, K.C., Jardine, K.C., and *Clauson*, for the respondent, contended that the proxy was invalid. Macaulay at the date of his appointment—that is, at the date of granting the power of attorney—was not qualified as a shareholder. He was not

named in the power, as at least contemplated if not provided by arts. 64 and 66.

Haldane, K.C., replied.

Dec. 19. The judgment of their Lordships was delivered by

LORD LINDLEY. The question raised by this appeal is whether an objection taken to a proxy used at a meeting of the shareholders of the above-named company can be sustained.

The company was incorporated in 1863 under the Indian Companies Act (XIX. of 1857), and in 1895 it was duly registered under the Indian Companies Act, 1882. It was formed to carry on trade in timber and petroleum in Burmah, Siam, and other places in the East, and by the company's memorandum of association and by its articles it was in substance provided that the business of the company should be carried on by the firm of Wallace & Co., merchants, of Bombay, "of whatever member or members that firm may for the time being consist," or, if they declined to act, by other managers to be appointed by the company.

As a matter of fact the company was formed to take over a branch of the business of Wallace & Co., and this firm were the secretaries, treasurers, and managers of the company. There never were any others.

By the company's articles of association voting by proxy was allowed. The articles relating to such voting and to the chairman of the company were as follows:—

"LXII. Votes may be given either personally or by proxy.

"LXIII. The instrument appointing a proxy shall be in writing under the hand of the appointor, or if such appointor is a corporation, under their common seal, and shall be attested by one or more witness or witnesses.

"LXIV. Every instrument appointing a proxy may be in the following form or as nearly therein as may be:—

"Bombay-Burmah Trading Corporation, Limited.

"I, ———, of ———, in ———, being a shareholder in the Bombay-Burmah Trading Corporation, Limited, and entitled to ——— vote (or ——— votes), hereby appoint ———, of

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———, as my proxy to vote for me and on my behalf at the ordinary or extraordinary (as the case may be) general meeting of the company, to be held on the ——— day of ———, and at any adjournment thereof (or at any meeting of the company that may be held in the year ———), (or and at all other general meetings of the said company until I shall revoke this authority). As witness my hand this ——— day of ———. Signed by the said ——— in the presence of ———.

"LXV. No person shall be appointed or have authority to act as a proxy who is not a shareholder in the company.

"LXVI. No person shall be allowed to vote or act as a proxy at any meeting unless the instrument appointing him shall have been deposited at the registered office of the company not less than forty-eight hours before the time for holding the meeting at which the person named in such instrument proposes to vote.

"LXVII. Unless the instrument appointing the proxy shall otherwise indicate, the proxy thereby appointed shall be deemed to be a continuing proxy, and shall be entitled to act as such until his appointment shall be revoked by instrument in writing, deposited at the registered office of the company."

* * * * *

"LXXI. The senior or only resident partner or representative for the time being of the firm, house, or co-partnership of Messrs. Wallace and Company at Bombay shall, at his option, be and continue the chairman of the company and of the board of directors, notwithstanding any clause or regulation of the company or in these presents to the contrary."

In May and June, 1902, a special resolution was passed to alter the memorandum of association with a view to extend the business of the company, and in July, 1902, the company presented a petition to obtain the sanction of the Court to the alteration. The petition was opposed on the ground (amongst others) that the special resolution was not duly passed, and the Court being of this opinion dismissed the petition without giving any decision on the merits.

The objection taken was that certain proxies held by the chairman and used by him at the meetings at which the

special resolution was passed were not in proper form and were invalid. They were not in the form given in art. 64, but they were in a form which had been in use for many years without objection.

Several proxies were objected to. It will be sufficient to refer to one which may be taken as a type of all.

The proxy objected to was dated October 14, 1881, and was duly executed by a lady of the Wallace family and properly attested. It was not a mere proxy, but a long document, and, in fact, a power of attorney not only to vote at meetings, but to act generally for the shareholder signing it in all matters connected with the company and any other company taking over its business. The authority extended to buying and selling shares and receiving dividends. The following extract contains the description of the persons authorized to act:—

"Know all men by these presents that I ——— of ——— do hereby nominate, constitute, and appoint Lewis Alex. Wallace, Alexander Falconer Wallace, John Annan Bryce, Henry Adair Richardson, and Michael Russell Wyer, and all persons who at any time during the continuance of this power of attorney may be partners in the firm of Wallace and Company, of Bombay, howsoever that firm may be at any time constituted, and Frederick Liddell Steel, and William Robert Macdonell, assistants in the said firm, and in the absence from Bombay of all the said persons then the persons or person for the time holding the procuration of the said firm and managing the said business jointly and each of them severally to be my attorneys or attorney for me and on my behalf to represent me in all my relations as they now exist or as they may at any time during the continuance of this power of attorney exist with the Bombay-Burmah Trading Corporation, Limited . . . . and to be my proxy to vote for me and on my behalf at any meeting or meetings of the said existing Corporation . . . . during the continuance of this power and in respect of all shares which I may at any time hold alone or jointly with others in the said corporation."

The proxy was used by Mr. Macaulay, who was in the chair. He was then a managing partner of the firm of Wallace & Co.,

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and was a shareholder in the corporation. But he was neither a member of the firm nor a shareholder in the corporation when the proxy was signed. Before the meetings his name was entered as usual in a register of proxies kept by the corporation as the person who would use the proxies at those meetings.

The objections taken to the proxy are (1.) that Mr. Macaulay is not named in it; (2.) that when it was signed he was neither a partner in the firm of Wallace & Co. nor a shareholder in the corporation.

The form given in the articles and the word "named" in art. 66 are relied upon as shewing that the person using the proxy must be named in it. No doubt it is convenient that this should be done. Art. 64, which gives the form, is, however, distinctly permissive only; and art. 66 is addressed, not to the form of the proxy, but to its deposit in the office in time to make inquiries, if necessary. If in this case the officers of the corporation or any shareholder had objected that the proxy was so framed that the person intended to use it could not be ascertained, and if this were true, their Lordships are not prepared to say that the proxy might not have been rejected. But no such difficulty in fact existed, nor did any one say it did. The connection between the firm of Wallace & Co. and the corporation was such that the officers of the corporation knew perfectly well that Mr. Macaulay was qualified to act and that he was going to act; and any shareholder applying for information could have obtained it at the office without any difficulty. Mr. Macaulay's name was entered in the office register of proxies as the person who would use the proxy. Although not named in it, in the strict literal sense of the word "named," he was sufficiently described in the proxy for all business purposes, and in their Lordships' opinion the articles require nothing more.

The next objection is, in their Lordships' opinion, equally untenable. It is founded on art. 65. But to construe this article as requiring the person appointed to be a shareholder when the proxy is signed is to put too narrow a construction on the words. If an unqualified person is named in the proxy

the nomination is not an appointment in any effective sense; his nomination does not become an appointment until he is qualified. In order to act something more is required —he must be qualified, not only when appointed, but when he acts.

Arts. 65, 66, and 67 only require that the appointment shall be complete and be in the office forty-eight hours before the meeting at which it is to be used, and that the qualification shall continue when the proxy is used. Their Lordships are of opinion that art. 65 was complied with in this case.

Their Lordships, therefore, will humbly advise His Majesty to allow this appeal, and to discharge the order appealed from, and to remit the petition on which the order was made to the High Court of Judicature at Bombay, in order that the petition may be heard on the merits, and that the costs of it may be dealt with by that Court. The costs of this appeal and of the motion made on February 4, 1904, must be borne by the respondent.

Solicitors for appellants: *Budd, Johnson & Jecks.*
Solicitors for respondent: *Payne & Lattey.*

[HOUSE OF LORDS.]

H. L. (E.) 1905 April 14.

HOULDER LINE, LIMITED . . . . APPELLANTS;

AND

GRIFFIN . . . . . RESPONDENT.

Employer and Workman—Compensation—Seaman—Employment on a Ship afloat in a Dock—Undertaker—Workmen's Compensation Act, 1897 (*c.* 37), *ss.* 1, 7—*Factory and Workshop Act*, 1901 (*c.* 22), *s.* 104.

Seamen employed in performing their ordinary duties as seamen afloat on board ship are not entitled to compensation for injury under the Workmen's Compensation Act, 1897, although the ship is at the time in a dock and the dock is a factory. In such a case the shipowner is not an "undertaker" within the meaning of the Act.

So *held* by the Earl of Halsbury L.C. and Lords Macnaghten and Lindley, Lord James dissenting.

The decision of the Court of Appeal, [1904] 1 K. B. 510, reversed.

THE respondent's husband, an able seaman, signed articles to serve on the appellants' steamship upon a voyage from Liverpool to the River Plate. The vessel called at Newport and entered the docks to take in her bunker coal. Having taken it in she was moved to and moored at the buoys in the docks "preparatory to proceeding to sea." While so moored and while the respondent's husband was engaged in "clearing up" the No. 5 hold, a piece of dunnage wood fell upon him and caused injuries of which he died. In an arbitration in the City of London Court the learned judge held that the case was not within the Act, and that the appellants were not liable for compensation. The Court of Appeal (Collins M.R. and Cozens-Hardy L.J., Mathew L.J. dissenting) reversed that decision and awarded to the respondent 150*l.*, the amount of compensation agreed between the parties.

Feb. 20. *Carver, K.C.*, and *Dawson Miller*, for appellants. To bring this case within s. 7 of the Act—"This Act shall apply only to employment by the undertakers . . . . on or in or about a . . . . factory"—the applicant must shew that the work being done at the time of the accident was connected

with and appropriate to the factory, that is the dock. In the present case that is not shewn. "Clearing up a hold" is work which may be done at sea as well as in dock. No cargo was apparently going to be loaded or in fact loaded. The employment was by the shipowner as such, and not as temporary occupier of a factory which by a statutory fiction the shipowner "shall be deemed to be" when he has the actual use or occupation of a dock: see Factory Act, 1901, s. 104, which consolidates the provisions of the previous repealed Factory Acts. This principle underlies all the cases on which the respondent must rely: *Raine* v. *Jobson & Co.* (1), where the ship was in dock for repair; *Stuart* v. *Nixon* (2), where the cargo was being loaded; *Bartell* v. *Gray & Co.* (3) In none of those cases were the shipowners the employers. Here the work had no relation to the use of the dock; the work was the work of sailors. Where the employment has no relation to the use of the dock or wharf the Act does not apply: *Wrigley* v. *Whittaker* (4); *Owens* v. *Campbell.* (5) Sailors are excluded from or at least not included in the class of workmen benefited by the Act. Here the shipowner was not an undertaker within the meaning of the Act.

Robson, K.C., and *G. A. Scott*, for the respondent. Loading and unloading are admitted to be employments connected with the use of a dock. Clearing up a hold is usually done—and must in the present case be taken to have been done—in preparation for loading. If it was not it was for the appellants to have shewn that it was not. Even if the loading at another port was too remote, it was preparing for the ship to get under weigh for that port. But the decision of the Court of Appeal may be justified on the broader ground that it is not necessary for the employment to be connected with the use of a dock. The Act contains no such words, and reading s. 1 together with s. 7 it embraces any employment on or in or about a dock by a temporary occupier of the dock. Locality is the test, not the kind of employment. If the place where the accident

(1) [1901] A. C. 404.
(2) [1901] A. C. 79.
(3) [1902] 1 K. B. 225.
(4) [1902] A. C. 299.
(5) [1904] 2 K. B. 60.

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happens is a dock at the moment occupied by the undertaker that is enough: *Barrett* v. *Kemp Brothers* (1); *Fogarty* v. *Wallis & Co.* (2) Here the shipowner was an undertaker, being in the use and occupation of premises within the dock: *Merrill* v. *Wilson.* (3)

Carver, K.C., in reply.

The House took time for consideration.

April 14. EARL OF HALSBURY L.C. My Lords, an accident causing death happened to a sailor while on board his ship while he was engaged in his ordinary work as a sailor, and the shipowner is sought to be made liable as an "undertaker" because the ship was afloat in a dock waiting to go to sea.

The employment of a sailor is not one of the employments to which the Act applies, but it is argued that because the injured man was on board a ship which was floating in a dock the shipowner was the occupier of a dock, and as such was undertaker within s. 7 of the Workmen's Compensation Act.

I do not think the shipowner was in any intelligible sense the occupier of the dock because his vessel was in the water surrounded by the structure of the dock.

Although the extraordinary jumble whereby a ship becomes a factory because it is in a dock, and so the shipowner becomes an undertaker, seems to me to be a reductio ad absurdum, it appears to have prevailed, and induced the Court of Appeal to reverse the judgment of the county court judge.

My Lords, I cannot agree with that judgment. I entirely agree with Mathew L.J., who dissented. It appears to me that the Court was misled by the case of *Raine* v. *Jobson* (4); but in that case the persons sought to be made responsible, and held to be responsible, were persons who had hired the dock for the purpose of repairing a vessel, and, whether there was a vessel in it or not, they were liable if a workman met with an accident in that dock while engaged in working there. The Court there proceeded upon the assumption that the then defendants were in the use and occupation of a dock which

(1) [1904] 1 K. B. 517.
(2) [1903] 2 I. R. 522.
(3) [1901] 1 K. B. 35.
(4) [1901] A. C. 404.

they had hired, and the fact that there was the wooden structure of a ship in it being repaired did not prevent the application of the section which rendered the occupiers of a dock the occupiers of a factory within the meaning of the Act. If in that case the then defendants had the actual use and occupation of the dock, as they clearly had, it was impossible to deny that they were "the undertakers." This is a totally different case, and does not come within the meaning of that decision.

I move your Lordships that the judgment be reversed, and the decision of the county court judge restored.

LORD MACNAGHTEN. My Lords, the question in this case is whether, under the Workmen's Compensation Act, 1897, an employer is liable to pay compensation in the case of a seaman who meets with personal injury by accident arising out of and in the course of his employment while serving afloat and engaged in the ordinary duties of his calling, if at the time when the accident occurs his ship happens to be in a dock. The majority of the Court of Appeal, Mathew L.J. dissenting, have held that in such a case the liability of the employer is to be found in the Act.

The facts which have given rise to the present question and the ground of the decision of the Court of Appeal are stated concisely by the Master of the Rolls in the case of *Owens* v. *Campbell, Ld.* (1) "The ship," said his Lordship, "was in a dock, and a seaman belonging to her was employed as part of his ordinary duty in clearing out a hold for the reception of cargo, and he met with an accident while so employed, which resulted in his death. A majority of this Court decided on the authority of *Raine* v. *Jobson* (2) that the fact that the deceased was a seaman did not exclude him from the operation of the Act, and that the case fell within its provisions."

With all deference to the Court of Appeal, I cannot help thinking that they have somewhat misapprehended the decision of this House in *Raine* v. *Jobson* (2), and so have been led to misconstrue the Act of 1897.

(1) [1904] 2 K. B. 63. (2) [1901] A. C. 404.

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The question is not, I think, whether seamen are excluded from the Act—whether, as the Master of the Rolls puts it in this case, there is "a special exclusion of sailors"—but rather whether seamen are within the contemplation of the Act at all. Nobody ever supposed that the Act was intended to apply to seamen as seamen. Seamen belong to a wholly different class from the class of men intended to be protected by the Act. They work under different conditions; they are the care of a different department; they are the subject of special legislation. A ship has so little in common with the places to which the Act of 1897 extends that one cannot doubt that ships and sailors would have been specially mentioned if the Act had been intended to include or affect them.

The case before your Lordships really depends on the question whether the employment in which the injured man was engaged was an "employment to which" the "Act applies." The Act applies "only to employment by the undertakers as . . . . defined on, in, or about" certain specified places, among which is included "a factory." "Factory" includes "any dock . . . . to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895." As defined in the Act, "undertakers . . . . means . . . . in the case of a factory . . . . the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895." The Factory Act, 1895, declares that "the person having the actual use or occupation of a dock . . . . or of any premises within the same or forming part thereof . . . . shall be deemed to be the occupier of a factory."

Now it seems to me to be pretty clear, upon the true construction of these somewhat singular provisions so curiously pieced together, that the shipowner in the present case was not the occupier of the dock where his ship was lying afloat, or of any premises within the same or forming part thereof. It is, I think, plain that by the expression "dock" in the Factory Act, 1895, is meant the solid structure and body of the dock, not the water space within its limits. A corresponding meaning must be given to the word "premises." I do not think that a ship lying in a dock, whether afloat or

not, can be included in the description of "premises within the same or forming part thereof." It follows, therefore, in my opinion, that the employment in which the injured person was engaged at the time of the accident was not an employment to which the Act of 1897 applies.

The case of *Raine* v. *Jobson* (1) seems to me to be a different case altogether. There the vessel was not lying in the water space of the dock. It had been removed to and placed in a dry dock—in a berth in a dock—of which the persons sought to be made liable had the actual use and occupation.

I am, therefore, of opinion that the decision of the Court of Appeal must be reversed and the judgment of the county court judge restored.

LORD JAMES. My Lords, in this case a seaman serving on board a merchant ship was, whilst discharging his ordinary duty as a seaman, so injured that his death ensued. The ship was lying afloat in a dock, but the work in which the respondent was engaged was ship's work and not dock work. The widow of the injured man seeks in this action to make the shipowners liable for the injury so sustained. Now, as the Workmen's Compensation Act of 1897 does not include sailors on ships by name within its provisions, the liability has to be found by virtue of other words.

The plaintiff's case is that the seaman was employed on, in, or about "a factory" within the meaning of sub-s. 4 of s. 7 of the Workmen's Compensation Act, and that contention is thus worked out. By operation of s. 7, sub-s. 2, of the Workmen's Compensation Act, every dock to which any provision of the Factory Acts is applied by the Factory and Workshop Act of 1895 is a factory. By s. 23, sub-s. 1, of the Factory and Workshop Act of 1895 certain provisions of the Factory Acts are to have effect as if every dock, wharf, &c., were included in the word "factory," and so for the purposes of the Act of 1897 every dock becomes a factory. It is also contended that the ship being in the dock, the owners of the ship employing

(1) [1901] A. C. 404.

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the deceased man were occupiers of a portion of the dock, and, being so, they became undertakers within the Act.

The case of *Raine* v. *Jobson* (1), an authority binding on your Lordships, goes far to establish these propositions. That case seems to differ from the one under consideration in one respect only. In *Raine* v. *Jobson* (1) the dock used was a dry dock, wherein a ship was being repaired. In the present case the vessel was moored in an open part of the dock. But the vessels in both cases were occupying a portion of a dock, for the use of which payment was made. Doubtless it appears a somewhat strange result to find that by owning a vessel lying in a dock the shipowner becomes the occupier of a factory. But it is the peculiarity of method employed in the legislative enactments we are dealing with that has produced so startling a result.

But finding the law as it is laid down by the Lord Chancellor in *Raine* v. *Jobson* (1), and also in the case of *Merrill* v. *Wilson* (2), I feel constrained to find that whilst the deceased man was in fact working on board a ship moored in a dock, he was by legal construction employed in a factory, of which the shipowner was at the time a part occupier, who thus becomes liable as an "undertaker." I therefore think that the decision of the majority of the Court of Appeal was correct.

LORD LINDLEY. My Lords, the seaman whose death has given rise to this action was doing ordinary seaman's work in a steamship. The ship had come into a wet dock for coal; she had loaded it, and had cast off to go out of dock to sea. Owing to the state of the tide she had to wait afloat in the dock, and she was moored to a buoy for convenience until the dock gates should open and she could get out. The accident happened whilst she was so moored. The seaman was clearing out the hold, and a heavy piece of wood fell upon him and injured him so severely that he died.

It is contended that the Workmen's Compensation Act, 1897, renders the shipowners liable to make compensation for this accident. The county court judge held that the Act did

(1) [1901] A. C. 404. (2) [1901] 1 K. B. 35.

not apply to the case. The Court of Appeal differed from him, Mathew L.J. dissenting. Hence this appeal.

The sections of the Act which are material are ss. 1 and 7, and the question on which the case turns is, Was the seaman engaged in any employment to which the Act applies? The employments to which it applies are enumerated in s. 7, and the words are: "This Act shall apply only to employment by the undertakers as hereinafter defined on or in or about a railway, factory, mine, quarry, or engineering work," and certain buildings. If this were all, it would be plain that the employment in which the seaman was engaged was not within the Act. But the section goes on to give a statutory meaning to the words "factory," "undertaker," and "workman."

The definition of "workman" has reference to an employment to which the Act applies, and is of very little assistance. "Factory" has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. "Undertakers" is defined, not generally, but with reference to railways, factories, quarries, laundries, mines, engineering works, and buildings. With reference to a factory, "undertaker" means the occupier thereof within the meaning of the Factory and Workshop Acts, 1878–1895.

The Factory and Workshop Acts, 1878–1891, do not mention docks; but by s. 7 of the Workmen's Compensation Act, a factory, as defined in the Act of 1878 (41 & 42 Vict. c. 16, s. 93), is to include any dock to which any of the provisions of the Acts 1878–1891 is applied by the Act of 1895. The only section of this Act which mentions docks is s. 23. This section makes some of the provisions of the earlier Acts applicable to docks as if they were included in the word "factory." It is in this way only that docks are brought within the operation of the Workmen's Compensation Act.

It is contended that s. 7 of the Workmen's Compensation Act in effect enacts that for the purposes of that Act a dock is under all circumstances to be treated as a factory, that a ship in a dock is in a factory, and that the owner of a ship in

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a dock is the occupier of a factory. I cannot adopt this view of the section. This House has already decided in *Wrigley* v. *Whittaker* (1) that "factory" in s. 7 means the factory of the employer. So far as a dock is concerned, the meaning of s. 7 appears to be that employment in a dock is an employment to which the Act applies, provided the employer is an undertaker within the meaning of the Act. But who is the undertaker when the employment is that of a seaman doing his ordinary work in a ship afloat in a dock and waiting to go to sea? The Act does not appear to me to make the shipowner an undertaker in such a case. If this is the result, the employment of the seaman in this case is not within the Act; and this I am of opinion is the true effect of ss. 1 and 7 when applied to ships and seamen employed by shipowners to do ordinary seamen's work.

It is to be noticed that ships and seamen are nowhere mentioned in the Act, and it is well known that the Act was never intended to apply to them when at sea. It is only in consequence of the definition of factory and of undertaker that ships and seamen can be brought within the provisions of the Act.

To treat the owner of a ship afloat in a dock and waiting to get out to sea as the occupier of a factory, and therefore an undertaker within the meaning of the Act, appears to me opposed to all good sense, and not to be rendered obligatory by s. 7.

In *Raine* v. *Jobson & Co.* (2) the Act was held to apply to a workman employed to clean and repair a ship in a dry dock which had been hired by ship repairers for the purpose of repairing her. The undertakers there were the repairers, and the dry dock was held to be a factory within the meaning of the Act, and it was occupied and used as such by the undertakers. But neither that decision nor any other goes anything like the length to which the Court of Appeal has gone on the present occasion.

Stuart v. *Nixon* (3) was a case between stevedores and a casual labourer employed by them in a dock.

(1) [1902] A. C. 299. (2) [1901] A. C. 404.
(3) [1901] A. C. at p. 82.

In *Merrill* v. *Wilson* (1) shipowners were held liable for injury to a workman—i.e., a landsman—employed by them to unload their ship at a wharf in a dock.

In *Owens* v. *Campbell, Ld.* (2), owners of a steamship were held not liable for an accident to a fireman when attending to the boilers. The ship was moored to a pontoon outside a dock, and was taking passengers on board previous to starting on her voyage. This is the most recent case on the subject, and was decided by the Court of Appeal after it had decided the case now before the House. I confess I have great difficulty in reconciling the two decisions.

Taking s. 1 and s. 7 together, both locality and nature of employment are important. To bring the present case within the Act the plaintiff must prove (1.) employment by the defendant; (2.) that the defendant is an undertaker, i.e., that the employment was on, in, or about a factory (in the statutory sense) of the defendant.

The defendant here was not an undertaker; he was not employing the plaintiff in a factory of which he was the occupier within the meaning of the Act.

In my opinion the appeal ought to be allowed.

Order of the Court of Appeal reversed and award of the judge of the City of London Court restored with costs here and below: cause remitted to the City of London Court.

Lords' Journals, April 14, 1905.

Solicitors: *William A. Crump & Son; Burn & Berridge.*

(1) [1901] 1 K. B. 35. (2) [1904] 2 K. B. 60.

Principle applied. PYRAH *v.* DONCASTER CORPN. [1949] 1 All E.R. 883.

[HOUSE OF LORDS.]

H. L. (E.) 1905 *April* 14.

BRINTONS, LIMITED . . . . . APPELLANTS;

AND

TURVEY . . . . . RESPONDENT.

Employer and Workman—Injury by Accident—Disease—Anthrax—Workmen's Compensation Act, 1897 (*c.* 37), *s.* 1.

While a workman was employed sorting wool in a factory a bacillus (according to the medical evidence or theory) passed from the wool to the eye of the workman and infected him with anthrax of which he died:—

Held, by the Earl of Halsbury L.C. and Lords Macnaghten and Lindley, Lord Robertson dissenting, that this was a case of "injury by accident" within the meaning of the Workmen's Compensation Act, 1897.

The decision of the Court of Appeal, [1904] 1 K. B. 328, affirmed.

THE respondent's husband, while employed with other workmen in sorting wool in the appellants' factory, was infected with anthrax on the 2nd of March, 1903, and died thereof on the 7th. In an arbitration held at Kidderminster, after hearing medical evidence, the county court judge awarded compensation to the respondent, saying: "I find as a fact that the anthrax, which was the immediate cause of death, was caused by the accidental alighting of a bacillus from the infected wool on a part of the deceased's person which afforded a harbour in which it could multiply and grow and so cause a malignant disease and consequent death. I can see no distinction in principle between the accidental entry of a spark from an anvil or the accidental squirting of scalding water or some poisonous liquid into the eye. The only difference is that in those cases the foreign substance would be so large as to be visible, in this case the foreign substance is microscopic. I think it immaterial whether there was in fact any external pimple or abrasion, because if there was, it was a fortuitous accident that the bacillus alighted on that particular spot. But I find in fact that there was no such abrasion or pimple. My judgment is based on the fact that there was in this case a fortuitous

intrusion of a foreign substance into the eye which by its presence there caused death."

This decision was affirmed by the Court of Appeal (Collins M.R., Mathew and Cozens-Hardy L.JJ.) upon the authority of *Fenton* v. *Thorley*. (1)

1904. Dec. 13, 15. *Ruegg*, *K.C.*, and *Albert Parsons*, for the appellants. The injury no doubt arose out of and in the course of the employment, but it was not a "personal injury by accident." There must be two things: a personal injury, and an accident. The plain natural meaning of "accident" must be taken. There must be some occurrence which would be popularly described as an accident, some force applied to the body: e.g., a pin-prick, scratch, contact with sharp tool, bruise, wound, or the like. Sunstroke is not an accident within a policy against "personal injury arising from accident": *Sinclair* v. *Maritime Passengers' Assurance Co.* (2), because sunstroke arises from natural causes. So it is with anthrax, or any infectious or contagious disease. If there had been an abrasion by accident and the bacillus entered through the abrasion, the result would be different. If this case is within the Act, then all cases of disease are. The Court of Appeal thought themselves bound by Lord Macnaghten's words in *Fenton* v. *Thorley*. (1) But that case has no bearing: there the injury was a rupture, and Lord Macnaghten's judgment shews that he did not intend to include such a case as the present. The Workmen's Compensation Act, s. 2, sub-s. 2, requires notice to be given of an injury, stating the cause of the injury and the date at which it was sustained. If the disease does not shew itself till several days after the entry of the bacillus, how is it possible to assign a date? By the Factory Act, 1901, c. 22, s. 19, notice of loss of life caused by an accident must be sent to the district inspector and the certifying surgeon. By s. 73 notice of anthrax (inter alia) contracted in a factory must be sent to the same persons, and the provisions of the Act with respect to accidents shall apply to cases of anthrax. That seems to imply that an injury by

(1) [1903] A. C. 443. (2) (1861) 3 E. & E. 478; 30 L. J. (Q.B.) 77.

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anthrax is not an injury by accident. But if it is, then the other cases referred to in s. 73, lead, phosphorus, arsenical or mercurial poisoning, are also injuries by accident. An accident is one thing; an accidentally contracted disease is another.

Pritchett and *Horace Norton*, for the respondent. The case comes directly within the definition or description of "accident" in *Fenton* v. *Thorley* (1) "as denoting an unlooked-for mishap or an untoward event which is not expected or designed." It was an accident or mishap that the anthrax bacillus lighted upon this man and not upon the other workmen. Why is not the attack of a bacillus as much an accident as a spark from a fire? No difficulty arises from the notices respectively required by the Workmen's Compensation Act and the Factory Act. The date must be given approximately, and as soon as the disease manifests itself. The same difficulty might occur if the injury caused by an undoubted accident did not disclose itself till after an interval.

[They also referred to *Walker* v. *Lilleshall Coal Co.* (2), *Pugh* v. *London, Brighton and South Coast Ry. Co.* (3), and *Thompson* v. *Ashington Coal Co.* (4)]

Ruegg, K.C., in reply.

The House took time for consideration.

1905. April 14. EARL OF HALSBURY L.C. My Lords, I am not able to deny the cogency of the reasoning of my noble and learned friend Lord Robertson when he contests that this House is concluded by its decision in *Fenton* v. *Thorley*. (1) I do not think the point which now stands for decision was either argued or upon the facts open for decision. Nevertheless I am of opinion that the judgment now under appeal is right.

My Lords, one proposition which to my mind goes far to solve the question under debate appears to have been accepted by all the judicial minds which have been directed to the subject, and that is that the language of the statute we are called upon to construe must be interpreted in its ordinary and

(1) [1903] A. C. 443.
(2) [1900] 1 Q. B. 481.
(3) [1896] 2 Q. B. 248.
(4) (1901) 84 L. T. 412.

popular meaning. The use of language preceded scientific investigation.

Probably it is true to say that in the strictest sense and dealing with the region of physical nature there is no such thing as an accident. The smallest particle of dust swept by a storm is where it is by the operation of physical causes, which if you knew beforehand you could predict with absolute certainty that it would alight where it did. But when the Act now under construction enacted that if in any employment to which the Act applied personal injury "by accident" arising out of and in the course of his employment is caused to a workman his employers shall pay compensation, I think it meant that, apart from negligence of any sort—either employers or employed—the industry itself should be taxed with an obligation to indemnify the sufferer for what was "an accident" causing damage. I do not stop to discuss the provisions which disentitle a sufferer, because they are not relevant to the question now under debate.

I so far agree with my noble and learned friend that I think, in popular phraseology from which we are to seek our guidance, it excludes, and was intended to exclude, idiopathic disease; but when some affection of our physical frame is in any way induced by an accident, we must be on our guard that we are not misled by medical phrases to alter the proper application of the phrase "accident causing injury," because the injury inflicted by accident sets up a condition of things which medical men describe as disease.

Suppose in this case a tack or some poisoned substance had cut the skin and set up tetanus. Tetanus is a disease; but would anybody contend that there was not an accident causing damage?

An injury to the head has been known to set up septic pneumonia, and many years ago I remember, when that incident had in fact occurred, it was sought to excuse the person who inflicted the blow on the head from the consequences of his crime because his victim had died of pneumonia and not, as it was contended, of the blow on the head. It does not appear to me that by calling the consequences of an accidental injury

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a disease one alters the nature or the consequential results of the injury that has been inflicted.

Many illustrations of what I am insisting on might be given. A workman in the course of his employment spills some corrosive acid on his hands; the injury caused thereby sets up erysipelas—a definite disease; some trifling injury by a needle sets up tetanus. Are these not within the Act because the immediate injury is not perceptible until it shews itself in some morbid change in the structure of the human body, and which when shewn we call a disease? I cannot think so.

I am, therefore, of opinion that the county court judge was quite right, and I move your Lordships accordingly.

LORD MACNAGHTEN. My Lords, on the facts found by the learned county court judge I am of opinion that the decision of the Court of Appeal was right. It is plain, I think, that the mischief which befell the workman in the present case was due to accident, or rather, I should say, to a chapter of accidents.

It was an accident that the noxious thing that settled on the man's face happened to be present in the materials which he was engaged in sorting. It was an accident that this noxious thing escaped the down draught or suck of the fan which the Board of Trade, as we were told, requires to be in use while work is going on in such a factory as that where the man was employed. It was an accident that the thing struck the man on a delicate and tender spot in the corner of his eye. It must have been through some accident that the poison found entrance into the man's system, for the judge finds that there was no abrasion about the eye, while the medical evidence seems to be that without some abrasion infection is hardly possible. The result was anthrax, and the end came very speedily.

Speaking for myself, I cannot doubt that the man's death was attributable to personal injury by accident arising out of, and in the course of, his employment. The accidental character of the injury is not, I think, removed or displaced by the fact that, like many other accidental injuries, it set up a well-known disease, which was immediately the cause of

death, and would no doubt be certified as such in the usual death certificate.

I have nothing more to add, because the meaning of the expression personal injury by accident, as used in the Act of 1897, was very fully considered in the case of *Fenton* v. *Thorley* (1) in this House. I am content to abide by what I am reported to have said in that case. It had the express concurrence of my noble and learned friends Lord Shand and Lord Davey, and the approval, I think, of my noble and learned friend Lord Lindley.

I agree that the appeal must be dismissed with costs.

LORD ROBERTSON. My Lords, this man died of anthrax, having become infected in his eye from the wool at which he was working. It is clear that the man's being attacked by anthrax arose "out of and in the course of his employment," and the question is was his catching anthrax an "accident" in the sense of the Act of 1897?

The language in which the county court judge describes the "accident" puts the case in the most favourable way possible for the theory of the respondent, for he speaks of "the accidental alighting of a bacillus from the infected wool on" the man's eye. But while scientifically accurate, this vivid presentment as of a concrete, although occult, incident must not blind us to the fact that any other case of disease falling within the wide scope of bacteriology might with equal accuracy be traced to the occurrence of a similar "accident." Anthrax is a disease; and unless the contracting of infectious disease (so it arises out of and in course of the employment) is "accident" in the sense of the Act, I do not see how this judgment can stand. If it does stand, then in every case in which a man dies of any infectious disease (his taking which arose out of and in course of his employment), all he has got to do is to get the doctor to prove (what could not be disputed) that a bacillus did it, and the accident is there. (It may be rash to say that a similar process of illustration and reasoning might not extend the application to non-infectious disease besides;

(1) [1903] A. C. 443.

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but I wish to confine the argument to what is clear.) And I must add that the "illustrations" (given by one of my noble and learned friends) of tetanus, pneumonia, or erysipelas ensuing on accident, differ from the present case in the one point essential to the controversy, for in the illustrations there is postulated an accident distinct from the disease, while in the case before your Lordships the so-called "accident" is simply the inception of the disease.

Now it is necessary steadily to have in mind that the question is whether, in the sense of the Act of 1897, this man's catching anthrax was accident. It is nothing (or little) to the purpose to say that it was an accidental occurrence. Colloquially, and accurately, we say that So-and-so accidentally caught cold or any other disease, and yet no one would think of saying that he had met with an accident. It is not everything that happens accidentally that is an accident. Accordingly, when the learned county court judge, in what is a very well-expressed judgment, bases it on the fact that there was here "a fortuitous intrusion of a foreign substance into the eye," the word "fortuitous" does not convince me, and the rest is merely, once more, the graphic description of the occult initiation of the disease.

Did the Legislature then mean, inter alia, the catching of infectious disease when it spoke of "personal injury by accident"? I cannot bring myself to think so. The class of mishaps now proposed to be included is so wide and so heterogeneous to those dangers to life and limb which admittedly are included, that I do not believe that language so remote was intended to have this result.

But then the question is a good deal clarified and brought up to the matter in hand by the argument of Mr. Ruegg and Mr. Parsons. This establishment, where the man took ill, comes under the Workmen's Compensation Act, as being a "factory" in the sense of the Factory Acts. Now, in the existing Factory Act of 1901, which is subsequent to that directly in question, and may therefore be referred to for a gloss or implication of the meaning of the Act of 1897, there are careful provisions about various diseases, and among them

anthrax; and the medical officer is required to send, in the case of an outbreak of any of those diseases, certain notices which are to be the same as in the case of "accidents." It is difficult to read this s. 73 otherwise than as speaking on the assumption that an attack of anthrax is not an accident in the sense of such legislation.

The respondent's main reliance was placed on the recent case of *Fenton* v. *Thorley*. (1) Now, first of all, what were the facts of the case? They are of the very simplest possible. The man ruptured himself, or, in other words, broke a part of his body by over-exertion in his work. No one grasping this fact could possibly say that this was a disease; and, therefore, the question now before your Lordships was not raised.

It is true that Lord Macnaghten used the expressions on which the Court of Appeal have founded. It seems to me that those expressions were obiter dicta only. My noble and learned friend's judgment, besides being very able is very long; and in discussing the section he was so enterprising as to hazard a definition. In expressing this definition he was not thinking of disease, or at least that was not the matter in hand, and is not referred to in his or in any other judgment except in the passage (p. 448) where my noble friend seems to have excluded disease from the application of the section; but I shall assume that it turns out that the words used are so wide as to cover disease. Now I must respectfully protest against this House being held bound by dicta, and above all by the most dangerous of all dicta, namely, definitions, except in so far as they relate to or are involved in the matter then in hand. I hold myself free on the present occasion to consider on its merits the question now raised, and I should think it much to be regretted if this House were precluded from doing so by observations made when the question of disease had not been considered. On the merits, and for the reasons I have stated, I think that these judgments ought to be reversed.

LORD LINDLEY. My Lords, I hope that the decision in this case will not be regarded as involving the doctrine that all

(1) [1903] A. C. 443.

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diseases caught by a workman in the course of his employment are to be regarded as accidents within the meaning of the Workmen's Compensation Act. That is very far from being my view of the Act, and I concur with the observations made by Cozens-Hardy L.J. on this point at the end of his judgment. In this case your Lordships have to deal with death resulting from disease caused by an injury which I am myself unable to describe more accurately than by calling it purely accidental.

The fact that an accident causes injury in the shape of disease does not render the cause not an accident. Whether in any particular case an injury in the shape of disease is caused by an accident or by some other cause depends on the circumstances of that case, and on the meaning to be attributed to the word "accident." The meaning of the word as used in the Workmen's Compensation Act was settled by this House in *Fenton* v. *Thorley Co., Ld.* (1); and having regard to that authority, and to the facts of this case as stated by the learned county court judge, his decision and the decision of the Court of Appeal were, in my opinion, quite right, and this appeal ought to be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, April 14, 1905.

Solicitors: *Helder, Roberts & Co., for Tunbridge & Co., Birmingham; Robbins, Billing & Co., for W. Waldron, Brierley Hill.*

(1) [1903] A. C. 443.

[HOUSE OF LORDS.]

SOUTH WALES MINERS' FEDERATION AND OTHERS . . . . . } APPELLANTS;

AND

GLAMORGAN COAL COMPANY, LIMITED, AND OTHERS . . . . . } RESPONDENTS.

H. L. (E.) 1905 *April* 14.

Contract—Procuring Breach of Contract—Cause of Action— Interference with Legal Right—Malice—Justification.

Procuring a breach of contract is an actionable wrong unless there be justification for interfering with the legal right.

Miners employed in collieries without giving notice to their employers and in breach of their contracts abstained from working on certain days upon the direction or order of a federation of the miners given by their executive council. The federation and council acted honestly without malice or ill-will towards the employers, and with the object only of keeping up the price of coal by which the wages were regulated:—

Held, that an action for damages lay by the employers against the federation and its officers, no justification for their action being shewn.

The decision of the Court of Appeal, [1903] 2 K. B. 545, affirmed.

THE Glamorgan Coal Company, Limited, and seventy-three other plaintiffs, owners of collieries in South Wales, brought this action against the South Wales Miners' Federation, its trustees and officers, and several members of its executive council, claiming damages for wrongfully and maliciously procuring and inducing workmen in the collieries to break their contracts of service with the plaintiffs, and alternatively for wrongfully and maliciously conspiring to do so. Evidence of the facts proved at the trial before Bigham J. without a jury is set forth in the report of his judgment (1), and the principal facts are stated by Lord James in this House. Briefly the case was as follows. The federation (which was registered as a trade union) was formed (inter alia) to consider trade and wages, to protect the workmen and regulate the relation between them and employers, and to call conferences. The wages were paid upon a sliding scale agreement,

(1) [1903] 2 K. B. 546-58.

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rising and falling with the price of coal. In November, 1900, the council of the federation, fearing that the action of merchants and middlemen would reduce the price of coal and consequently the rate of wages, resolved to order a "stop-day" on November 9, and informed the workmen. This order was obeyed by over 100,000 men, who took a holiday and thereby broke their contracts of service. At a conference held on November 12 between delegates of the men and the council a resolution was passed authorizing the council to declare a general holiday at any time they might think it necessary for the protection of wages and of the industry generally. In October and November, 1901, the council (as Bigham J. found) ordered four stop-days for the same reason as before, and the men took a holiday on each of those days in breach of their contracts. Bigham J. found that the action of the federation was dictated by an honest desire to forward the interest of the workmen and was not in any sense prompted by a wish to injure the masters, between whom and the men there was no quarrel or ill-will; that having been requested by the men by the resolution of November 12, 1900, to advise and direct them as to when to stop work, the federation and its officers did to the best of their ability advise and direct the men honestly and without malice of any kind against the plaintiffs, and therefore had lawful justification or excuse for what they did. The learned judge gave judgment for the defendants. This decision was reversed by the Court of Appeal (Romer and Stirling L.JJ., Vaughan Williams L.J. dissenting), who entered judgment for the plaintiffs, the damages to be assessed. (1)

Feb. 23, 24, 27, 28; March 2, 3. *Rufus Isaacs, K.C.*, and *S. T. Evans, K.C.* (*Bailhache, Holman Gregory*, and *Clement Edwards* with them), for the appellants. The question is whether honest and bonâ fide advice and guidance given without malice or ill-will, upon request and in performance of a duty, is a justification for interfering with a contract. In *Quinn* v. *Leathem* (2) Lord Macnaghten says: "It is a violation of legal right to interfere with contractual relations

(1) [1903] 2 K. B. 545. (2) [1901] A. C. 495, at p. 510.

recognised by law if there be no sufficient justification for the interference"; in other words, "no just cause or excuse." The controversy turns on these words. It was the appellants' duty to advise the men, and the discharge of that duty constitutes good cause and excuse. There is no authority that the inducing, without malice, of a person to break a contract is an actionable wrong. In *Lumley* v. *Gye* (1) malice was assumed: there was knowledge of the contract and intention to injure, and these constitute malice. Defamation of character is primâ facie actionable, but if the occasion is privileged, there must be proof of express malice. The necessity of malice is admitted even by Crompton J. in *Lumley* v. *Gye* (1), though he was more adverse to the defendant than the other judges. There must be some limitation to the proposition that a man is liable for inducing to the breach of a contract, though the line has been differently drawn by different judges. In *Bowen* v. *Hall* (2) the elements which went to prove malice were knowledge of the contract, desire on the defendant's part to obtain advantage at the plaintiff's cost, and wrong motive. But in *Allen* v. *Flood* (3) Lords Macnaghten, Herschell, and Shand reserved their opinions as to whether *Lumley* v. *Gye* (1), *Bowen* v. *Hall* (2), and *Temperton* v. *Russell* (4) were rightly decided. Lord Watson also criticized those authorities with a note of disapproval, especially with regard to the importation of motive as an element. The tendency of opinion is in favour of the dissentient judgments of Coleridge J. in *Lumley* v. *Gye* (1) and of Lord Coleridge C.J. in *Bowen* v. *Hall*. (2) Even if one admits to the full the authority of *Lumley* v. *Gye* (1), and the two cases which adopted it, they are not applicable. The appellants' purpose was not to injure the respondents or to gain an advantage at their expense. It was to keep up the price of coal, not to punish the masters; and that makes all the difference. Thus the present case is exactly like *Mogul Steamship Co.* v. *M'Gregor, Gow & Co.* (5), in which Bowen L.J.'s judgment was expressly approved by this

(1) (1853) 2 E. & B. 216.
(2) (1881) 6 Q. B. D. 333.
(3) [1898] A. C. 1.
(4) [1893] 1 Q. B. 713.
(5) (1889) 23 Q. B. D. 598; [1892] A. C. 25, 59.

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SOUTH WALES MINERS' FEDERATION v. GLAMORGAN COAL COMPANY.

House. There, as Lord Hannen said, the defendants had no malicious or sinister intent against the plaintiffs. The appellants were discharging their duty to protect and advise the men in order to maintain the standard of wages, and they firmly believed and alleged that they were acting in the interest of the employers. It was a moral and social duty, such as that of a parent, a counsel, or a doctor to advise a child, a client, or a patient honestly and without ill-will or desire to injure. Moral duty is enough to constitute privilege: *Jenoure* v. *Delmege* (1); *Stuart* v. *Bell*. (2) In *Read* v. *Friendly Society of Operative Stonemasons* (3) the purpose was to injure the plaintiff—to prevent his becoming a stonemason. So in *Quinn* v. *Leathem* (4) the direct purpose was to injure the plaintiff, and the new point was decided that a combination to induce others not to enter into a contract, if made without justification or excuse, is unlawful. But that has no application here. If there be just cause or excuse and no malice the act being lawful in itself is not made unlawful by its being done in combination.

Upjohn, K.C., and *Montague Lush, K.C.* (*Trevor Lewis* with them), for the respondents. It is a startling proposition that the existence of a moral or social duty is a justification for procuring men to break their contracts. There has been no attempt to define the duty or to explain how it arose, still less to shew that there has been a performance of that duty. The appellants exceeded their powers under the rules. It was not a case of persuasion, but of coercion, and those who failed to obey orders were treated as blacklegs. The story of *Quinn* v. *Leathem* (5) was repeated. In Lord Lindley's words, "What may begin as peaceable persuasion...." becomes "peremptory ordering with threats open or covert of very unpleasant consequences to those who are not persuaded." The case is as far as possible removed from the analogies suggested of a parent, or counsel, or a doctor. Even in those relations advice might be actionable, and the question would be for the jury.

(1) [1891] A. C. 73.
(2) [1891] 2 Q. B. 341.
(3) [1902] 2 K. B. 88, 732.
(4) [1901] A. C. 495.
(5) [1901] A. C. at p. 538.

Advice had little to do with this matter. There was no spontaneous action on the part of the men. They were stirred up by the federation, which advised a "stop-day" and then ordered a mass meeting to enforce it. Every judge except Bigham J. has agreed with Crompton J. in *Lumley* v. *Gye* (1), that a person commits an actionable wrong who "with notice interrupts the relation subsisting between master and servant." It was held in this House in *Quinn* v. *Leathem* (2) that the gist of the action in *Lumley* v. *Gye* (1) was not malice, but "wrongfully and unlawfully" enticing a servant from his master's service. Malice depends not on the motive but on the illegal character of the act objectively considered. In Lord Watson's words in *Allen* v. *Flood* (3), it consists in "knowingly procuring an illegal act." It is difficult to imagine any other "just cause or excuse" for inducing a breach of contract than that the contract itself was illegal or contrary to public policy. Here the federation, knowing that after *Taff Vale Railway* v. *Amalgamated Society of Railway Servants* (4) the federation itself would be liable, sought to shift the responsibility on to the sliding scale committee. But it is not permissible thus, by the intervention of a third person who uses illegal means, to escape liability, the illegal means amounting, as here, to coercion and intimidation.

Isaacs, K.C., in reply. There was no coercion—no threat, intimidation, or unlawful act. Epithets such as "unlawful" prove nothing, but only beg the question, as Lord Herschell said in *Allen* v. *Flood*. (5) To imply liability coercion must be of itself and independently of motive a wrongful act: per Lord Watson. (6) Boycotting here, as in *Allen* v. *Flood* (7), was "conspicuously absent." There are always occasional idle days, as, e.g., from insufficiency of wagons, and by staying away the men had no notion of terminating the contract. Procuring may, no doubt, be more than advising, but is legitimate if no unlawful means are used. Duty in the general

(1) 2 E. & B. 216.
(2) [1901] A. C. 495.
(3) [1898] A. C. at p. 96.
(4) [1901] A. C. 426.
(5) [1898] A. C. at p. 128.
(6) [1898] A. C. at p. 98.
(7) [1898] A. C. 1.

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sense, not merely legal duty, constitutes good cause and excuse. The *Stonemasons' Case* (1) would have been decided differently if any element of duty had been present.

The House took time for consideration.

April 14. EARL OF HALSBURY L.C. (read by Lord Macnaghten). My Lords, I cannot think that in this case there is anything to be determined except the question of fact. I say so because the questions of law discussed are so well settled by authority, and by authority in this House.

To combine to procure a number of persons to break contracts is manifestly unlawful. This is found as a fact to have been done here, and is also found to have caused serious damage to the persons who were entitled to have these contracts performed.

It is, further, a principle of the law, applicable even to the criminal law, that people are presumed to intend the reasonable consequences of their acts. It is not, perhaps, necessary to have recourse to such a presumption where, as upon the facts stated, it is apparent that what they were doing must necessarily cause injury to the employers. We start, then, with the infliction of an unlawful injury upon the persons entitled to have the services of their workmen. It follows that this is an actionable wrong unless it can be justified.

Now it is sought to be justified, first, because it is said that the men were acting in their own interest, and that they were sincerely under the belief that the employers would themselves benefit by their collieries being interrupted in their work; but what sort of excuse is this for breaking a contract when the co-contractor refuses to allow the breach? It seems to me to be absurd to suppose that a benefit which he refuses to accept justified an intentional breach of contractual rights. It may, indeed, be urged in proof of the allegation that there was no ill-will against the employers. I assume this to be true, but I have no conception what can be meant by an excuse for breaking a contract because you really think it will not harm your co-contractor.

(1) [1902] 2 K. B. 732.

I absolutely refuse to discuss the cases which have been suggested widely apart from the question of what pecuniary advantage may be reaped from breaking a contract, where, upon moral or religious grounds, people may be justly advised to refuse to perform what they have agreed to do.

Some cases may be suggested when higher and deeper considerations may, in a moral point of view, justify the refusal to do what has been agreed to be done. Such cases may give rise to the consideration whether, in a moral or religious point of view, you are not bound to indemnify the person whom your refusal injures; but a Court of law has only to decide whether there is a legal justification.

Again, I refuse to go into a discussion of the duty or the moral right to tender advice. The facts in this case shew nothing in the nature of advice, even if the supposed duty could be created by people who made them their official advisers who were to advise them even to break the law. But, as I have said, these are peremptory orders given by the official superiors of the body, and it has been found by the learned judge who tried the case that the body sued was responsible for the interference with the workmen.

I think the appeal should be dismissed.

LORD MACNAGHTEN. My Lords, I agree in the motion which my noble and learned friend the Lord Chancellor proposes, and I also agree with him in thinking that the question before your Lordships lies in a very narrow compass.

It is not disputed now—it never was disputed seriously—that the union known as the South Wales Miners' Federation, acting by its executive, induced and procured a vast body of workmen, members of the union, who were at the time in the employment of the plaintiffs, to break their contracts of service, and thus the federation acting by its executive knowingly and intentionally inflicted pecuniary loss on the plaintiffs. It is not disputed that the federation committed an actionable wrong. It is no defence to say that there was no malice or ill-will against the masters on the part of the federation or on the part of the workmen at any of the collieries

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thrown out of work by the action of the federation. It is settled now that malice in the sense of spite or ill-will is not the gist of such an action as that which the plaintiffs have instituted. Still less is it a defence to say that if the masters had only known their own interest they would have welcomed the interference of the federation.

It was argued—and that was the only argument—that although the thing done was primâ facie an actionable wrong, it was justifiable under the circumstances. That there may be a justification for that which in itself is an actionable wrong I do not for a moment doubt. And I do not think it would be difficult to give instances putting aside altogether cases complicated by the introduction of moral considerations. But what is the alleged justification in the present case? It was said that the council—the executive of the federation—had a duty cast upon them to protect the interests of the members of the union, and that they could not be made legally responsible for the consequences of their action if they acted honestly in good faith and without any sinister or indirect motive. The case was argued with equal candour and ability. But it seems to me that the argument may be disposed of by two simple questions. How was the duty created? What in fact was the alleged duty? The alleged duty was created by the members of the union themselves, who elected or appointed the officials of the union to guide and direct their action; and then it was contended that the body to whom the members of the union have thus committed their individual freedom of action are not responsible for what they do if they act according to their honest judgment in furtherance of what they consider to be the interest of their constituents. It seems to me that if that plea were admitted there would be an end of all responsibility. It would be idle to sue the workmen, the individual wrong-doers, even if it were practicable to do so. Their counsellors and protectors, the real authors of the mischief, would be safe from legal proceedings. The only other question is, What is the alleged duty set up by the federation? I do not think it can be better described than it was by Mr. Lush. It comes to this—it is the duty on all

proper occasions, of which the federation or their officials are to be the sole judges, to counsel and procure a breach of duty.

I agree with Romer and Stirling L.JJ., and I think the appeal must be dismissed.

LORD JAMES. My Lords, the nature of the issues raised in this case, and the pecuniary consequences at stake, require that the fullest consideration should be given to your Lordships' judgment. At the same time, the facts to be dealt with are for the most part admitted, and, if not, are easily ascertainable; and in regard to the duty of applying principles of law to such ascertained facts your Lordships have received great assistance from the able arguments of counsel at the bar of the House. As the facts and circumstances affecting the case have already been fully dealt with, I need do no more than refer to them very briefly.

The action is brought by the plaintiffs as owners of collieries against the South Wales Miners' Federation and certain individual members of it, upon the following grounds set out in the statement of claim: "That the defendants, well knowing the terms and conditions of the contracts of service under which the workmen employed at the collieries of the plaintiffs were working, wrongfully and maliciously, by causing notice to be given to the workmen employed at the plaintiffs' collieries, procured and induced the said workmen to break their contracts of service with the plaintiffs, and in breach thereof to abstain without giving due notice from working at the said collieries on certain days . . . . and the workmen employed at the said collieries did, by reason of such procurement and inducement, and in breach of their contracts of service with their employers, abstain without due notice from working at the said collieries."

The defendants, in addition to denying the above allegations, amongst other arguments alleged that they acted in the bonâ fide belief that the course of action advised by them would greatly benefit both the plaintiffs and defendants, and that they, the defendants, had reasonable justification and excuse for the course pursued by them.

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The first question to be determined is, Did the defendants procure and induce the plaintiffs' workmen to break their contracts of service? I think it clear that this question must be answered in the affirmative.

On November 5, 1900, the following resolution was passed by the defendants' federation: "It was unanimously resolved to order a stop-day on Friday next, and that a conference be held on Monday next to decide upon our future action." On the same day a manifesto was issued by the federation addressed to the workmen, in which it is stated, "We have unanimously resolved that a general holiday be taken throughout the coalfields by all colliery workmen on Friday, November 9th, 1900." The colliers carried out the resolution of the federation, and the stop-day took place. The employers protested, and warned the workmen that if such stoppage of work was repeated legal remedy would be sought.

In October, 1901, steps were taken by the federation to cause the workmen again to stop work. But the so-called Taff Vale case having been determined by your Lordships in July, 1901, the danger of legal liability was apparent, and the federation, therefore, slightly disguised themselves as being the workmen's members of the sliding scale committee. But this disguise was scarcely maintained, and was not persisted in during the argument at the bar.

On October 15, 1901, Mr. W. Brace, as vice-president of the defendants' federation, in a speech said that in certain events "the executive council of the federation, in whom power was vested by the whole workmen according to a conference resolution, would unhesitatingly declare a series of stoppages with a view to regulate the supply according to the demand."

On October 29, 1901, the following resolution was passed by those who called themselves the workmen's representatives of the sliding scale joint committee: "It was unanimously resolved to issue instructions to the workmen to observe Thursday next as a general holiday at all the collieries throughout the South Wales coalfield."

On October 23, October 29, and November 4, 1901, telegrams were sent on behalf of the executive council to the repre-

sentatives of the different branches in the following form:— October 23: "Sliding scale committee has decided that all collieries must observe Friday and Saturday next as a general holiday." October 29: "Men must be idle Thursday next." November 4: "Stop next Wednesday."

In addition to these communications evidence was given which justifies the certain conclusion that the defendants did more than advise the workmen upon the subject of these stop-days. No doubt there was, by the rules of the federation, a general duty cast upon it "To take into consideration the question of trade and wages, and to protect workmen generally, and to regulate the relation between them and employers," and these somewhat indefinite words might justify advice being given by the executive council to the workmen. Still there remains the question, Can it be lawful to advise the unlawfully breaking of a contract of service? But, be this as it may, I think it is established that both in 1900 and 1901 responsible officers of the federation did far more than give advice. They initiated, they directed, and they gave orders, so that it is correct to employ the legal term, and say that they induced and procured the workmen to break their contracts.

If it be that the defendants' acts amount to inducing and procuring, a great portion of the able arguments placed before your Lordships on behalf of the appellants becomes of no avail. It is true that great difficulty arises when hypothetical cases are suggested of advice given under a great moral sense of right, or where great good would result from a contract being broken, or where the claims of relationship or guardianship demand an interference amounting to protection. Each of such cases must be determined as it arises, but upon the facts as I think they must be found in this case no such difficulties arise. The action of the defendants in going, as I have said, to the extent of inducing and procuring the commission of an unlawful act places them in a very different position to that occupied by a person whose duty it is to offer advice to one who needs to be guided or protected.

If this view be correct, the allegation in the statement of claim, that the defendants induced and procured the workmen

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to break their contracts, is established. It is admitted that the workmen in so acting committed an unlawful act, that in consequence the employers sustained damage, and that the defendants had notice of such contracts and of the consequences of the breach. It yet remains to deal with the words "wrongfully and maliciously" as averred in the statement of claim.

As to the word "wrongfully" I think no difficulty arises. If the breach of the contract of service by the workmen was an unlawful act, any one who induces and procures the workmen, without just cause or excuse, to break such contract also acts unlawfully, and thus the allegation that the act done was wrongfully done is established.

But the word "maliciously" has also to be dealt with. The judgment of Bigham J. proceeds on the ground that "to support an action for procuring a breach of contract it is essential to prove actual malice."

I cannot concur in this view of the law. The word "maliciously" is often employed in criminal and civil pleadings without proof of actual malice apart from the commission of the act complained of being required. If A. utters a slander of B., even if he be a stranger to him, the averment that A. maliciously spoke such words of B. is established by simply proving the uttering of words taken to be false until the contrary be proved. In such an action the word "maliciously" may be treated either as an unnecessary averment or as being proved by inference drawn from the proof of the act being wrongfully committed. I think also that the learned judge's judgment is not supported by the authorities to which he refers.

In *Bowen* v. *Hall* (1) Brett L.J., with the sanction of Lord Selborne, thus expressed his view: "Wherever a man does an act which in law and in fact is a wrongful act, and such an act as may as a natural and probable consequence of it produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie."

In the *Mogul Case* (2) Bowen L.J. also said: "Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage, another

(1) 6 Q. B. D. 333. (2) 23 Q. B. D. 598.

in that other person's property or trade, is actionable if done without just cause or excuse."

And in *Quinn* v. *Leathem* (1) Lord Macnaghten thus defined the law on the subject: "A violation of legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere with contractual relations recognised by law, if there be no sufficient justification for the interference."

It will be observed that none of these three very learned judges employ the word "maliciously" as being necessary in order to constitute a right of action.

But a further question has to be disposed of. At the trial and at the bar of your Lordships' House the counsel for the appellants contended that their clients had good cause and excuse for the alleged unlawful act they committed. That such justification—such "good cause and excuse"—may exist is, I think, a sound proposition. The above words of Lord Macnaghten and of Bowen L.J. so declare. The facts upon which this attempted justification in this case is based are fully before your Lordships and need not be recapitulated. I take the results of them to be that in one sense the defendants acted in good faith. They, I think, honestly believed that the stoppage of work they resolved upon would increase the price of coal and so benefit both the workmen and the employers. Towards their employers the defendants entertained no malice. At the same time they knew that the employers had given notice of their objection to any such stoppage of work. And so the federation not only advised, but resolved and ordered that the workmen should break their contracts under conditions that would constitute an unlawful act in the men. As far as the defendants could exercise control the men were not allowed to make use of their own discretion. In order, therefore, to establish the existence of good cause and excuse all the defendants can say is, "We, the federation, had the duty cast upon us to advise the workmen. We did advise them to commit an unlawful act, but in giving that advice we honestly believed that they would be in a better financial position than if they acted lawfully and fulfilled their contracts." Even if it be

(1) [1901] A. C. 510.

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assumed that such allegations are correct in fact, I think that no justification in law is established by them. The intention of the defendants was directly to procure the breach of contracts. The fact that their motives were good in the interests of those they moved to action does not form any answer to those who have suffered from the unlawful act. During the arguments that have been addressed to your Lordships I do not think quite sufficient distinction was drawn between the intention and the motives of the defendants. Their intention clearly was that the workmen should break their contracts. The defendants' motives, no doubt, were that by so doing wages should be raised. But if in carrying out the intention the defendants purposely procured an unlawful act to be committed, the wrong that is thereby inflicted cannot be obliterated by the existence of a motive to secure a money benefit to the wrong-doers.

For these reasons I think the judgment of the Court of Appeal should be affirmed.

LORD LINDLEY. My Lords, I agree so entirely with the judgments of Romer and Stirling L.JJ. that I should say no more were it not for the great importance of some of the arguments addressed to your Lordships on this appeal and which deserve notice.

It is useless to try and conceal the fact that an organized body of men working together can produce results very different from those which can be produced by an individual without assistance. Moreover, laws adapted to individuals not acting in concert with others require modification and extension if they are to be applied with effect to large bodies of persons acting in concert. The English law of conspiracy is based upon and is justified by this undeniable truth.

But the possession of great power, whether by one person or by many, is quite as consistent with its lawful as with its unlawful employment; and there is no legal presumption that it will be or has been unlawfully exercised in any particular case. Some illegal act must be proved to be threatened and intended, or to have been committed, before any Court of

justice in the United Kingdom can properly make such conduct the basis of any decision.

These remarks are as applicable to trade unions as to other less powerful organizations. Their power to intimidate and coerce is undoubted; its exercise is comparatively easy and probable; but it would be wrong on this account to treat their conduct as illegal in any particular case without proof of further facts which make it so. It is not incumbent on a trade union to rebut any presumption of illegality based only on their power to do wrong. Freedom necessarily involves such a power; but the mere fact of its existence does not justify any legal presumption that it will be abused.

In the case before your Lordships there is proof that the members of the mining federation combined to break and did break their contracts with their employers by stopping work without proper notice and without proper leave. There is also proof that the officials of the federation assisted the men to do this by ordering them to stop work on particular days named by the officials. To break a contract is an unlawful act, or, in the language of Lord Watson in *Allen* v. *Flood* (1), "a breach of contract is in itself a legal wrong." The form of action for such a wrong is quite immaterial in considering the general question of the legality or illegality of a breach of contract. Any party to a contract can break it if he chooses; but in point of law he is not entitled to break it even on offering to pay damages. If he wants to entitle himself to do that he must stipulate for an option to that effect. Non-lawyers are apt to think that everything is lawful which is not criminally punishable; but this is an entire misconception. A breach of contract would not be actionable if nothing legally wrong was involved in the breach.

The federation by its officials are clearly proved in this case to have been engaged in intentionally assisting in the concerted breach of a number of contracts entered into by workmen belonging to the federation. This is clearly unlawful according to *Lumley* v. *Gye* (2) and *Quinn* v. *Leathem* (3), and

(1) [1898] A. C. at p. 96. (2) 2 E. & B. 216.
(3) [1901] A. C. 495.

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the more recent case of *Read* v. *Friendly Society of Stonemasons*. (1) Nor is this conclusion opposed to *Allen* v. *Flood* (2) or the *Mogul Steamship Company's Case* (3), where there was no unlawful act committed.

The appellants' counsel did not deny that, in his view of the case, the defendants' conduct required justification, and it was contended (1.) that all which the officials did was to advise the men, and (2.) that the officials owed a duty to the men to advise and assist them as they did.

As regards advice, it is not necessary to consider when, if ever, mere advice to do an unlawful act is actionable when the advice is not libellous or slanderous. Nor is it necessary to consider those cases in which a person, whose rights will be violated if a contract is performed, is justified in endeavouring to procure a breach of such contract. Nor is it necessary to consider what a parent or guardian may do to protect his child or ward. That there are cases in which it is not actionable to exhort a person to break a contract may be admitted; and it is very difficult to draw a sharp line separating all such cases from all others. But the so-called advice here was much more than counsel; it was accompanied by orders to stop, which could not be disobeyed with impunity. A refusal to stop work as ordered would have been regarded as disloyal to the federation. This is plain from the speeches given in evidence on the trial; and in my opinion it is a very important element in the case which cannot be ignored.

As regards duty the question immediately arises—duty to do what? The defendants have to justify a particular line of conduct, which was wrongful, i.e., aiding and abetting the men in doing what both the men and the officials knew was legally wrong. The constitution of the union may have rendered it the duty of the officials to advise the men what could be legally done to protect their own interests; but a legal duty to do what is illegal and known so to be is a contradiction in terms. A similar argument was urged without success in the case of the *Friendly Society of Stonemasons* (1) already referred to.

(1) [1902] 2 K. B. 732. (2) [1898] A. C. 1. (3) [1892] A. C. 25.

Then your Lordships were invited to say that there was a moral or social duty on the part of the officials to do what they did, and that, as they acted bonâ fide in the interest of the men and without any ill-will to the employers, their conduct was justifiable; and your Lordships were asked to treat this case as if it were like a case of libel or slander on a privileged occasion. My Lords, this contention was not based on authority, and its only merits are its novelty and ingenuity. The analogy is, in my opinion, misleading, and to give effect to this contention would be to legislate and introduce an entirely new law, and not to expound the law as it is at present. It would be to render many acts lawful which, as the law stands, are clearly unlawful.

My Lords, I have purposely abstained from using the word "malice." Bearing in mind that malice may or may not be used to denote ill-will, and that in legal language presumptive or implied malice is distinguishable from express malice, it conduces to clearness in discussing such cases as these to drop the word "malice" altogether, and to substitute for it the meaning which is really intended to be conveyed by it. Its use may be necessary in drawing indictments; but when all that is meant by malice is an intention to commit an unlawful act without reference to spite or ill-feeling, it is better to drop the word malice and so avoid all misunderstanding.

The appeal ought to be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, April 14, 1905.

Solicitors: *Smith, Rundell & Dods, for Walter Morgan, Bruce & Nicholas, Pontypridd; Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

[HOUSE OF LORDS.]

H. L. (E.) 1905 *April* 14.

YORKSHIRE MINERS' ASSOCIATION AND OTHERS . . . . . } APPELLANTS;

AND

HOWDEN AND OTHERS . . . . . RESPONDENTS.

(*Ex parte* AS TO CERTAIN RESPONDENTS.)

Trade Union—Application of Funds contrary to Rules—Strike Pay—Action for Injunction by Individual Member—"Directly enforcing Agreement"—Trade Union Act, 1871 (*c.* 31), *s.* 4.

A trade union was established for objects which included payment to members locked out or on strike. The whole of the funds were to be applied in carrying out the specified objects according to the rules. The union misapplied part of the funds by payments of strike money in cases not authorized by the rules. An individual member having brought an action against the union, its trustees and some of its officials, for an injunction restraining them from making the payments:—

Held, by the Earl of Halsbury L.C. and Lords Macnaghten, Robertson, and Lindley, Lords Davey and James dissenting, that the action was not instituted with the object of "directly enforcing" an agreement for the application of the funds to provide benefits to members within the meaning of the Trade Union Act, 1871, s. 4, the object being not to apply but to prevent misapplication of the funds, and that the action was maintainable.

The decision of the Court of Appeal, [1903] 1 K. B. 308, affirmed.

THE Yorkshire Miners' Association had registered their rules under the Trade Union Acts, 1871 and 1876. Among the objects for which the trade union was established was (rule 3 (*g*)) to provide a weekly allowance for the support of members and their families who might be locked out or on strike. By rule 3 (*j*) the whole of the moneys received by the association should be applied to carrying out the specified objects according to rules. Rules 64 and 65 stated the conditions under which support might be given to members or branches on strike. The respondent Howden, a miner and member of the association, brought this action against the association and some of its officials claiming an injunction to restrain them from misapplying the funds of the association

by the payment of strike moneys contrary (as was alleged) to the rules. The circumstances under which the payments were being made are fully set out in the report of the decision below and need not be repeated here. The main question was whether the action fell within the scope of the Trade Union Act, 1871 (c. 31), s. 4, which provides that nothing in the Act shall enable any Court to entertain any legal proceeding instituted with the object of "directly enforcing" or recovering damages for the breach of any of the following agreements .... (3.) an agreement for the application of the funds of a trade union, (*a*) to provide benefits to members. Grantham J., who tried the case with a special jury, held that the payments were not authorized by the rules and that the action could be maintained, and gave judgment for the plaintiff for an injunction restraining the defendants from misapplying the funds of the association and dealing with them contrary to the rules. This decision was affirmed by the Court of Appeal (Vaughan Williams, Stirling, and Mathew L.JJ.) with a variation extending the injunction to the trustees of the association who were added as defendants. (1)

Feb. 2, 3, 6. *Rufus Isaacs, K.C.*, and *Danckwerts, K.C.* (*Compston* with them), for the appellants. Before the Trade Union Act, 1871, these associations were unlawful as being in restraint of trade. The Act in legalizing them imposed conditions. No litigation was to be permitted between members. The earliest case on this section is *Rigby* v. *Connol* (2), where Jessel M.R. said that the right of property is the foundation of the jurisdiction of the Court where the member of a society has been expelled and thereby deprived of property. In that case the plaintiff did not claim in respect of property, and it was held both on that ground and also under s. 4 of the Act of 1871 that he was not entitled to relief for the expulsion. That decision was followed in *Duke* v. *Littleboy* (3) and in *Chamberlain's Wharf* v. *Smith* (4) upon the ground that the

(1) [1903] 1 K. B. 308.
(2) (1880) 14 Ch. D. 482.
(3) (1880) 49 L. J. (Ch.) 802; 28 W. R. 977.
(4) [1900] 2 Ch. 605.

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cases fell within s. 4, which prevents the Court from directly enforcing agreements to provide benefits to members. The whole argument for the respondent turns upon the word "directly." It is said that an action for an injunction to prevent the union dealing with funds otherwise than in accordance with its rules is not within the prohibition, as it is an indirect attempt. But there can be no injunction to restrain an act which is not illegal, and an injunction is the most direct of remedies against what is unlawful. The words "object" and "directly enforcing" are explanatory of each other. The object of the action was to enforce the agreement, and the means sought were direct in substance though negative in form. The original form of an injunction was always negative, however complicated a periphrasis was involved. It thus became equivalent to specific performance. This negative form did not finally disappear until *Jackson* v. *Normanby Brick Co.* (1) The question is of the substance, not the form of the action. Here the purpose is the direct enforcement of an agreement, and the case is therefore different from *Wolfe* v. *Matthews* (2), where an injunction was granted to restrain the application of funds in a manner contrary to the agreement on the ground that the injunction would not be a direct enforcement of the agreement. *Swaine* v. *Wilson* (3) and *Strick* v. *Swansea Tinplate Co.* (4) have no application. *M'Laren* v. *Miller* (5) is inconsistent with *Rigby* v. *Connol* (6), which was not cited. The plaintiff is really seeking to enforce the agreement, which the Act says the Court must not do. It can never have been the intention of the Legislature to enable persons to do negatively what they may not do affirmatively: *Crocker* v. *Knight.* (7)

[They also contended that there was no misapplication of the funds or breach of the rules.]

Atherley Jones, *K.C.*, and *R. E. L. Vaughan Williams*, for the trustees, were not heard.

(1) [1899] 1 Ch. 438.
(2) (1882) 21 Ch. D. 194.
(3) (1889) 24 Q. B. D. 252.
(4) (1887) 36 Ch. D. 558.
(5) (1880) 7 R. 867.
(6) 14 Ch. D. 482.
(7) [1892] 1 Q. B. 702.

Montague Lush, K.C. (*H. T. Waddy* and *H. W. W. Wilberforce* with him), for the respondent Howden, was requested to argue only the question whether the action could be maintained. The action was not brought to enforce an agreement, but to restrain an illegal act. It is therefore not within the prohibition of s. 4. It is not all agreements which are forbidden, and s. 3 has made valid certain agreements. The object of a trade union is not merely to collect and distribute money, but to obtain the advantage of co-operative protection. The appellants' contention would, if accepted, be disastrous to the existence of these societies: the action of the trustees and officials would be absolutely unfettered. Sect. 9 is expressly framed in recognition of the collective powers of the trustees, and no force could be given to it if such an action as this could not be brought. The plaintiff sought to restrain the illegal application of the funds of the union. The trustees by that section are authorized to bring or defend any action concerning the property of the union. The application of s. 4 is limited to (1.) agreements between individual members as such, (2.) agreements as to subscriptions or penalties, (3.) agreements for the purposes specified under (*a*), (*b*), and (*c*), and the whole section is remote from the purposes of this action. The plaintiff has no personal interest to serve, and the case is widely different from *Rigby* v. *Connol* (1) and *Chamberlain's Wharf* v. *Smith* (2), where the personal advantage of the plaintiffs was at stake. It is true that if the injunction is granted the result may be that part of the funds may come to the plaintiff, but that is not the "object" of the action. It is only with respect to directly enforcing a benefit that s. 4 is prohibitive. To give a wider application would be inconsistent with s. 9, which recognises the collective responsibility of the trustees: see Farwell J. in *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants*. (3) The rules of a trade union correspond with the articles of association of a company and may be enforced in like manner; and under s. 9 the trustees are empowered to bring or defend actions under "the title of

(1) 14 Ch. D. 482. (2) [1900] 2 Ch. 605.
(3) [1901] A. C. 426.

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their office." Under the rules no majority of members could lawfully sanction strike pay in the circumstances which happened. It was not a mere question of a breach of regulations, but of an illegal act, and one member was as much entitled to restrain a wrong use of funds—apart from benefit payments—as a shareholder is entitled to restrain directors; and one man may do so as well as a thousand: *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1), per Lord Halsbury L.C. (2), and Lord Bramwell. (3) *M'Laren* v. *Miller* (4) was rightly decided and is in favour of the plaintiff.

[They also referred to Lindley on Companies, 5th ed. p. 579.]

Danckwerts, K.C., in reply.

The House took time for consideration.

April 14. EARL OF HALSBURY L.C. (read by Lord Macnaghten). My Lords, in this case the plaintiff, a member of the Yorkshire Miners' Association, a trades union registered under the Act of 1871, complains that the funds of that society are being diverted from their proper object, and seeks by injunction to prevent that misapplication.

It appears to me that the sole question in this case is whether the plaintiff is at liberty to bring the action, or whether the action is one which is prohibited by the provision in the Act of 1871, which provides that nothing in the Act shall enable any Court to entertain any legal proceedings with the object of directly enforcing or recovering damages for the breach of any of the following agreements, and then the agreements are inserted which the Court are in effect prohibited from directly enforcing. But for the differences of judicial opinion which have arisen upon the construction of this provision, it would have been, to my mind, enough to say that this action does not seek directly to enforce any one of the agreements referred to in the statute, or to seek damages for their breach; but, inasmuch as the question has been raised and argued at great length, I do not feel at liberty to dispose of it in so summary a manner.

(1) [1892] A. C. 25.
(2) [1892] A. C. at pp. 38–9.
(3) [1892] A. C. at pp. 46–7.
(4) 7 R. 867.

The question is not a new one. It was raised twenty-three years ago before Fry J., and, in my judgment, rightly decided. Fry J. says, upon the exact question which is here in debate: "An order that the defendant should pay money to the plaintiff would be a direct enforcement of the agreement for the application of the funds, but all that is sought here is to prevent the payment of the money to somebody else. Either that is no enforcement of an agreement at all or it is an indirect enforcement."

My Lords, I cannot escape from this reasoning, nor do I see any inconsistency between that decision and the case before Sir George Jessel, and a long line of judicial decisions has recognised the distinction which the learned judge himself pointed out between the case before him and the decision given by Sir George Jessel. I am bound, however, to say if that decision ever came up for review I think it would have to be considered whether it does not strike the word "direct" out of the statute.

My Lords, I do not think that if this provision is out of the way the plaintiff's claim can be seriously contested. That the proposed use of the funds which he seeks to restrain is a flagrant violation of their own rules seems to me to be proved, and the language and object of the 4th section of the Act seems to me not at all what the argument on the other side assumes it to be. That argument seems to assume that the object of the enactment was to keep the trades unions out of the jurisdiction of the Court altogether. I do not think it does anything of the kind. It recites with great care what the Courts are not to interfere with, and that exemption from their jurisdiction is very precisely limited.

It seems to me that it would have been a very colourable concession to the trades unions if the Legislature had left their funds, which under the arrangement made constituted a trust for particular purposes, without any protection against those entrusted with the distribution of their funds. That the Court should not interfere with their distribution according to their own rules when such distribution was within the purposes of the trust is one thing, but that there should be no

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recourse to the Courts where it is threatened to divert them is another.

What can be the object of registering, as is required by the 3rd section, the purposes for which the funds are available? Its trustees are the persons in whom their property is vested. What is there to prevent the operation of the ordinary law which protects trust property from being diverted from its proper objects? Of course, there is nothing except the section to which I have referred, and surely that section cannot mean that, because the preservation of the property in trust is one that indirectly will benefit the beneficiaries, therefore it is a suit for enforcing one of the recited agreements which certainly in their terms are inapplicable.

I therefore move your Lordships that the appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I cannot help thinking that if the plaintiff had only taken the trouble to indicate in his writ or in a statement of claim the ground of his complaint, and if, instead of laying his case before a jury, he had resorted to a tribunal more familiar with the subject, and perhaps better fitted to deal with it, some confusion and a good deal of delay and expense would have been avoided.

The case in itself, when understood, is, I think, simple enough. Was the matter of which the plaintiff, as a member of the Yorkshire Miners' Association, complains beyond the powers of the association? Was the plaintiff in his isolated position—one member of the association standing alone—entitled to sue? Is the fact that the association is a registered trade union a bar to relief in such an action? These, I think, are the only questions to be considered, and there is only one of them, as it seems to me, that gives rise to any difficulty.

The Trade Union Act, 1871, requires that the rules of every registered trade union shall contain provisions in respect of the several matters mentioned in the 1st schedule to the Act. Among those matters are included "the whole of the objects for which the trade union is established," and "the purposes for which the funds thereof shall be applicable." Now the

rules of the Yorkshire Miners' Association as registered set forth in plain and distinct language the objects of the association and the purposes for which its funds may be applied. Clause 3, sub-section (*j*), declares that the whole of the moneys received by the association shall be applied in carrying out the objects specified in the preceding sub-sections in accordance with the rules. In an earlier clause (clause 1) there is an express direction that the funds of the association shall not be appropriated to any other use. It is, therefore, beyond the powers of the association to apply its funds, or any part of them, to any purpose not authorized by its rules.

Was, then, the payment of strike-money in the present case authorized by the rules of the association? On this point your Lordships did not think it necessary to call upon the respondent. The question is fully discussed and completely disposed of by the opinions of the learned Lords Justices in the Court of Appeal, and I have nothing to add to what they said. Then if the action of the association, which was challenged by the plaintiff, was beyond the powers of the association, it seems clear, apart, of course, from any objection arising under the Act of 1871, that in an unincorporated society like this any single member suing alone would have a right to resist it and to call upon the Court to interpose by injunction. That was established in this House in the case of *Simpson* v. *Westminster Palace Hotel Co.* (1), and is, I apprehend, beyond question.

So far it is all plain sailing. The difficulty, such as it is, is found in the Act of 1871. But the difficulty, if I may presume to say so, is, I think, not so much in the language of the Act as in the language of the learned judges who have expounded it. The commentaries are in fault rather than the text.

The Act of 1871 relieves trade unions from consequences which would otherwise result from the purposes of the union being in restraint of trade. That circumstance by itself is not to render void or voidable any agreement or trust. But, on the other hand, this concession to modern ideas is not to make

(1) (1860) 8 H. L. C. 712.

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all trade union contracts enforceable at law. Nothing in the Act is to "enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of" any of the several agreements which the enactment goes on to specify.

Now the first question that arises on this part of the enactment is, What is the meaning of the expression "directly enforcing"? I cannot think that the Legislature intended to strike at proceedings for directly enforcing certain agreements, leaving untouched and unaffected all proceedings (other than actions for damages) designed to enforce those particular agreements indirectly. To forbid direct action in language that suggests that the object of the action so forbidden may be attained by a side-wind seems to me somewhat of a novelty in legislation. I venture to think that the word "directly" is only put in to give point to the antithesis between proceedings to enforce agreements directly and proceedings to recover damages for breach of contract, which tend, though indirectly, to give force and strength to the agreement for breach of which an action may be brought. However, I need not dwell on this point, for it seems to me that for the present purpose the result must be the same whatever meaning or effect may be attached to the expression "directly."

The agreements which the Court is not at liberty to deal with are arranged under five headings or classes. The first class comprises a set of agreements with which it would be obviously inexpedient or impossible for the Court to deal. In the second class is included "any agreement for the payment by any person of any subscription or penalty to a trade union." One would expect to find next some such clause as this—"Any agreement for the payment to any member of any benefit assured by the rules of the trade union"—following the language of the 2nd clause of the 1st schedule to the Act. If that had been the language we should have had a clause pointing to a personal benefit conferred on a member, which is what Vaughan Williams L.J. takes sub-s. 3 (*a*) to be. It no doubt includes that, but I think it goes much further. The words are: "3. Any agreement for the application of the funds of a trade union,—

(*a*) to provide benefits to members." At first sight it is not very easy to see why the clause took this shape. I cannot help thinking that it comes from the apprehension which the leaders of the workmen then felt of the extreme danger to their combinations which might result from any attempt to separate the funds of the union, distinguishing between those collected or intended for benevolent purposes and those collected or intended for ordinary trade purposes.

Then I come to the question, What was the "object" of the present litigation? Was it to enforce an agreement for the application of the funds of the union to provide benefits to members? I should say certainly not. The object of the litigation was to obtain an authoritative decision that the action of the union which was challenged by the plaintiff was not authorized by the rules of the union. The decision might take the form of a declaration or the form of an injunction, or both combined. But the decision, whatever form it might take, would be the end of the litigation. No administration or application of the funds of the union was sought or desired. The object of the litigation was simply to prevent misapplication of the funds of the union, not to administer those funds, or to apply them for the purpose of providing benefits to members.

I am aware that in expressing this view I am dissenting from the opinion of Sir George Jessel in the case of *Rigby* v. *Connol.* (1) In that case, after referring to s. 4, sub-s. 3 (*a*), of the Act of 1871, which is quoted accurately by the learned judge (or it may be by the reporter), his Lordship makes the following observations: "I am satisfied that the agreement contained in the rules is an agreement to provide benefits for members, and that if I decide in favour of the plaintiff I directly enforce that agreement, because I declare him entitled to participate in the property of the union, and the only property they have is their subscriptions and fines, and I restrain the society from preventing that participation. It seems to me that is directly enforcing that agreement; in fact, it is in substance directing and enforcing the specific performance of it, nothing more or less."

(1) 14 Ch. D. 482.

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There I think the learned judge departs rather widely from the language of the enactment. If the Act had said that no Court should enforce an agreement to provide benefits for members there would have been an end of the matter. But the Act does not say that, or I think anything like it. It is not every trade union agreement that the Court is forbidden to enforce. The effect of Sir George Jessel's observations in conjunction with the cases of unenforceable contracts specified in the Act makes trade union agreements one and all alike unenforceable. There is really nothing left. The Act, however, proposes only to strike at certain agreements, leaving, at least apparently, the jurisdiction of the Court untouched as to everything else. In making these remarks I do not wish to be understood as expressing doubt as to the correctness of the actual decision in *Rigby* v. *Connol.* (1)

The proceedings which the plaintiff has instituted do not, I think, involve the administration of the funds of the Yorkshire Miners' Association collected for benevolent purposes or the application of those funds to provide benefits to members. Nor was the litigation, as it seems to me, instituted with that object. It was simply an application to the Court to determine the true construction of certain rules which had been, as the plaintiff contended, misconstrued by the executive of the association.

I need hardly point out how disastrous it might be to the funds of this union, and to trade unions generally, if there were no means of preventing the managers and masters of the union from diverting its funds from their legitimate and authorized purposes.

One word as to the form of the order under appeal. I think it is most objectionable, and I trust it will not form a precedent. I think, and I may add that the Lord Chancellor agrees with me in thinking, that the order should be varied by prohibiting directly and in terms the diversion of the funds of the union to the particular purpose which the Court holds to be unauthorized. I would suggest (and I may mention that the Lord Chancellor agrees) that the order might go in the following terms: "Declare that the payment of strike pay to the financial members of the

(1) 14 Ch. D. 482.

Yorkshire Miners' Association in pursuance of the resolution of the council of the said association passed on the 24th of July and confirmed on the 11th of August, 1902, was in contravention of the rules of the association, and that the said resolution purporting to authorize such payment was ultra vires and illegal." This proposed variation, if your Lordships should accept it, would of course make no difference in the costs of the action, which I think should be borne by the appellants both here and below, and the appeal should be dismissed.

LORD DAVEY. My Lords, the plaintiff in this action is an individual member of a trade union registered under the provisions of the Trade Union Act, 1871, and he sued the association, the general treasurer, and the two treasurers of the branches concerned, for an injunction to restrain them from misapplying the funds of the union and dealing with the same contrary to the rules of the said association and the provisions contained therein. The misapplication complained of is the payment of strike pay to certain members of the union who were on strike under circumstances which did not entitle them, according to the rules of the union, to the receipt of that benefit.

I have come to the opinion that this action cannot be maintained by the plaintiff. The question turns on the proper construction to be put on the language of s. 4 of the Act of 1871. By s. 3 of that Act it is enacted that the purposes of any trade union shall not by reason merely that they are in restraint of trade be unlawful so as to render void or voidable any agreement or trust. The language is not quite accurate, but I think the meaning and effect is to enable such actions to be brought on any agreement or trust affecting the union or the rights of the members inter se as might have been brought if the purposes of the union were free from the objection that they are in restraint of trade. By s. 4, however, it is enacted that nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely (inter alia), (3.) any agreement for the application of the funds of a trade union (*a*) to provide benefits to

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members, subject to a proviso that nothing in the section is to be deemed to constitute any of the before-mentioned agreements unlawful. By s. 8 all the real and personal property of the trade union is vested in trustees, and (9.) the trustees or any other officer of the trade union who may be authorized to do so by the rules thereof are empowered to defend or bring any action, suit, prosecution, or complaint in any Court of law or equity, touching or concerning the property, right, or claim to property of the trade union. It is not denied that this action could not be maintained under the common law; the question therefore comes to be whether it is authorized by the provisions of s. 3 of the Act as qualified by the provisions of s. 4.

My Lords, I assent to the very just observation made by Mr. Lush in the course of his able argument, that one should endeavour to give a meaning to every word in a statutory enactment; and I will endeavour to do so in construing the words of the section in question. I am of opinion that "an agreement for the application of the funds of a trade union to provide benefits to members" means an agreement to the benefit of which the members as such are entitled, and not merely a particular agreement with the individual who sues. Such an agreement is to be found in the rules by which the association is governed. These rules, in fact, form the social contract between the members, and every person on becoming a member accedes to them, and is bound by them, and, on the other hand, is entitled to whatever benefits are thereby secured for members. The particular rules in this case are those numbered 64 and 65, which prescribe the conditions under which a member may become entitled to what I have called "strike pay." Rule 3 (*j*) prescribes that "the whole of the moneys received by this association shall be applied to carrying out the foregoing objects according to rules." But even if there were not this rule I should be of opinion that rules 64 and 65 are exclusive, or (in other words) that according to their true construction they mean that strike pay shall not be given except under the prescribed conditions as well as that it may be given under those conditions. And I think that the negative stipulation is just as truly and as much part of the agreement for application of

the funds to provide benefit to members as the affirmative stipulation. The next question is, What is the "object" of this proceeding? I am of opinion that this must be discovered from a consideration of the relief sought, the grounds upon which it is sought, and the right of action of the plaintiff which entitles him to that relief. I do not think that any Court is entitled to look outside the proceedings themselves, as Mr. Lush invited us to do, and consider what were the motives of the plaintiff, or those who are promoting the action, or the ulterior purposes or consequences which they hope to attain by means of the action. Such an inquiry would, in my opinion, be wholly inadmissible in applying this section.

Now, my Lords, I cannot doubt that the object of this action is to enforce what I have called the negative stipulation in the agreement, and that it is in fact and in truth for specific performance of the agreement. In *Lumley* v. *Wagner* (1) Lord St. Leonards could not compel Miss Wagner to sing for Mr. Lumley, but he could prevent her from singing elsewhere in breach of her agreement. Is it doubtful that the Court was thereby directly enforcing the performance of the agreement in the only manner in which it could be enforced by a Court of Equity? The words, I will observe, are not "to enforce the application or distribution," but to enforce an agreement for those purposes. This is an action for compelling the council and other officers of the union to observe and govern themselves by the terms of the agreement contained in the rules, and I am at a loss to understand what right of action the plaintiff had except on the allegation that the payments sought to be restrained were contrary to the rules. The writ in fact is properly framed on that hypothesis. It is, of course, easy to say that the action is in one aspect for the execution of a trust and not for enforcing the agreement. The association not being an incorporated body, the appointment of trustees and the powers given to them are the machinery provided by the Act for carrying out its purposes. The trustees, however, have no powers of management. No complaint is made against them, and they were not even originally defendants to the

(1) (1852) 1 D. M. & G. 604.

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action. They were only added in the Court of Appeal with the intention of getting over a technical defect, whether effectually or not I will discuss presently. The real defendants are the association itself, and its executive officers representing the majority of the members opposed to the views of the plaintiff, and the only injunction asked for by the writ was against them. My Lords, I cannot regard the trustees when added to the record otherwise than as merely formal and passive defendants, and I do not think that the addition of the names of the trustees to the record has had the effect of converting the action into a trust action, which it clearly was not as the action was originally framed. The trust is but the machinery devised for securing the performance of the agreement and the other purposes of the association, and if you are entitled to treat an action like the present one as one for the execution of a trust and not for the direct enforcement of the agreement, there is no conceivable case (at least I cannot think of one) coming within the description in s. 4, sub-s. 3 (*a*), of which you might not say the same; and the enactment would become quite inoperative. The form of the action would not affect the substance of it, but in this case the form expresses the substance.

It will be clear from what I have said that, in my opinion, the object of this action is that of directly enforcing the agreement in the rules. I wish to give full force and effect to that word "directly," and I think it means this: Where the primary object of the action is to enforce the agreement, and the right of the plaintiff to maintain the action is founded on his right to have the rules observed, I think that the action must be deemed to be one for directly enforcing the agreement. But where the right of action is of a different character, and the construction and effect of the rules (if it comes in at all) only comes in as evidence in support of the particular relief claimed, I think that the action would not be one for "directly" enforcing the agreement. I will illustrate my meaning thus: I am disposed to think that the trustees might have maintained this action against the original defendants under the powers given to them by s. 9 of the Act, and this is, in my opinion, an

answer to one argument used by counsel, that if the appellants are right, then if this action cannot be maintained, the members of the association are without any remedy to prevent a diversion of their funds. In this union the trustees must be members, but it is not necessary under the Act that they should be so. They would sue as owners of the property of which they are the statutory owners and guardians. In an action to recover or protect the property of the union the construction or effect of the rules might not come into question at all—as, for instance, where the action was against a treasurer or other executive officer who set up a claim to the ownership of the property or money in question, or threatened to deal with it as his own. But in other cases the rules might be material, but only as evidence in support of the claim. In such cases I think the object of the action might properly be described as only indirectly for enforcing the agreement.

My Lords, it is a satisfaction for me to know that the opinion which I have come to has the support of Sir George Jessel in *Rigby* v. *Connol* (1) and Denman J. in *Duke* v. *Littleboy*. (2) In *Rigby* v. *Connol* (1) the plaintiff alleged that he had been wrongfully expelled from a trade union, and claimed a declaration that he was entitled to participate in the enjoyment of the property and effects of the trade union and in its rights, privileges, and benefits, and for an injunction to restrain the defendants from excluding him. Sir George Jessel dismissed the action. In his judgment the learned judge said: "I am satisfied that the agreement contained in the rules is an agreement to provide benefits for members, and that if I decide in favour of the plaintiff I directly enforce that agreement because I declare him entitled to participate in the property of the union, and the only property they have is their subscriptions and fines, and I restrain the society from preventing that participation. It seems to me that that is directly enforcing that agreement—in fact it is in substance directing and enforcing the specific performance of it, nothing more or less."

And after pointing out that the rules contained stipulations in restraint of trade, he added: "If nothing in the Act, therefore,

(1) 14 Ch. D. 482. (2) 49 L. J. (Ch.) 802.

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will assist the plaintiff, he must still be in the position of a member of an illegal association coming to a Court of justice to assist him to enforce his rights under that illegal association. If that is so it is impossible for me, and I do not think it ever was intended by the Legislature, looking to the terms of the Act of Parliament, to enable the Courts to interfere on behalf of the members of these societies for the purpose of getting relief inter se with respect to rights and liabilities contrary to the Act."

I cannot myself see any distinction in principle between an injunction to restrain the exclusion of the plaintiff from a right to participation in the property and one to restrain the removal or diversion of the property in which he claims to participate. *Rigby* v. *Connol* (1) has been followed by the Court of Appeal in *Chamberlain's Wharf, Ld.* v. *Smith.* (2)

In *Duke* v. *Littleboy* (3) the action was by the executive council of a trade union association against the executive officers and trustees of a branch of the society for an injunction to restrain the defendants from dividing funds belonging to the central society amongst members of the branch contrary to the rules. The central executive had refused to sanction a strike by members of the branch.

It was attempted to distinguish the case from *Rigby* v. *Connol* (1) on the same grounds as have been argued before your Lordships. Denman J. held that was too great a refinement when you looked at the true object and words of the Act; and he concluded his judgment in these words: "*Rigby* v. *Connol* (1) was an application to restore a member. This is to prevent funds being dealt with in any other manner except according to the rules, and I think it would be frittering away the meaning of this clause if I were to put any other construction upon it than that this is a proceeding to directly enforce an agreement for the application of the funds of a trade union to provide benefits for members."

On the other hand, *Wolfe* v. *Matthews* (4) is relied on by the plaintiff, and has been followed in the Courts below.

(1) 14 Ch. D. 482.
(2) [1900] 2 Ch. 605.
(3) 49 L. J. (Ch.) 802.
(4) 21 Ch. D. 194.

In that case the plaintiffs sued, on behalf of themselves and other members of a trade society, to restrain the defendants from carrying out an amalgamation with another society, and pleaded that the defendants intended, unless restrained by injunction, to pay money out of the funds to the amalgamating society. Fry J. held that the judgment of Sir George Jessel did not apply to the case. He said: "An order that the defendant should pay money to the plaintiffs would be a direct enforcement of an agreement for the application of the funds, but all that is sought here is to prevent the payment of the moneys to somebody else. Either that is no enforcement of an agreement at all, or it is an indirect enforcement. To take a simple case, if there is a contract by A. to pay 100*l.* to B., that contract is directly enforced by a judgment of the Court directing A. to pay to B. And the contract is only indirectly enforced, or not at all, by a judgment restraining A. from paying the money to some one else. It is only by a stretch of language that such an order can be said to enforce A.'s contract; the utmost that can be said is that it is then more likely that A. will pay to B."

I never differ from Sir Edward Fry without great hesitation, but in this case I must frankly say that I do not follow his reasoning. Of course a creditor cannot restrain his debtor from disposing of his money until he has recovered judgment and issued execution. But if the learned judge means by his illustration an ear-marked bag of sovereigns which A. has contracted to deliver to B. and no one else, I take the liberty of saying that an action to restrain A. from delivering it to a third person would clearly be one for directly enforcing the agreement; and that seems to me the only way of making the illustration relevant to the case then before the Court. The learned judge cannot have meant that an order for payment to the plaintiffs was the only mode of directly enforcing the agreement; and he appears to me to ignore the existence of the agreement that benefits should be given to members according to the rules and not otherwise. It is not, however, stated in the report that the amalgamation complained of was alleged to be ultra vires, and it may be that the action was founded

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only on the allegation that the amalgamation would be prejudicial to the plaintiffs by diminishing the funds applicable for their benefit. If so, the learned judge's reasoning is intelligible and his illustration would be relevant. But in that case the decision would be wholly irrelevant to the question now before your Lordships.

In the Scotch case of *M'Laren* v. *Miller* (1) the interdict granted was only to keep things in statu quo until the rights of the parties should be ascertained. It was, however, an action by trustees under s. 9, to which, I think, different considerations may apply. If and so far as it is a decision against the opinion I have already expressed on the construction of the Act, I think it was wrongly decided.

My Lords, I gather from Stirling L.J.'s judgment that he also felt some difficulty as to the plaintiff's right to maintain this action. But he thought that the analogy of the procedure in the Chancery Division, by which a shareholder is allowed to sue for his individual interest where the company refuses to sue to restrain the commission of an act which is ultra vires the company, ought to be applied to trade unions. I have some doubt whether, having regard to the wide language in which the objects of the society are stated in rule 3, and the power of the members to alter the rules, the acts complained of were ultra vires the association, or more than a breach of the regulations which the majority of the members might condone. But I will assume the former view is the correct one. The suggestion of the learned Lord Justice might in that case get over an objection that the trustees were the proper plaintiffs, but does not touch the present point; and you are brought back to the point from which I started, whether an action by an individual shareholder to restrain a breach of the agreement contained in the rules respecting benefits to members is not such an action as is described in s. 4, sub-s. 3 (*a*), of the Act.

My Lords, I must apologise for having troubled you at such great length; but as I have the misfortune to differ from the unanimous judgment of the Court below and from the majority

(1) 7 R. 867.

of your Lordships, I thought it my duty to state the reasons for the opinion I have formed fully, even at the risk of trespassing on the patience of your Lordships.

In my opinion the appeal should be allowed, and the action dismissed with costs here and below.

LORD JAMES. My Lords, I have entertained considerable doubt as to the decision that should be arrived at in this case, but in the result I have come to the conclusion that the appellants are entitled to succeed in their appeal. The circumstances under which this action has been instituted have already been fully stated to your Lordships, and I shall only briefly refer to them.

The first question to be determined is whether the 4th section of the Trade Union Act of 1871 prevented the action under discussion from being brought. That Act amounted to a very charter of legal existence. Before the passing of it trades unions had no legal recognition. The Act effected it, but at the same time did not afford access to the public legal tribunals for all purposes. For some purposes the trades unions were left to determine their own differences, and so s. 4 provided "that nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements: . . . . (3.) An agreement for the application of the funds of a trade union (*a*) to provide benefits to members, or (*b*) to furnish contributions."

My Lords, Mathew L.J. in his judgment terms this section "a remarkable relic of prejudice." It was rather the result of great legislative timidity. If the legalisation of trades unions could no longer be resisted, a modified legalisation only, the Legislature said, should be conferred upon them. The Courts of law should not be called upon to enforce certain rights of members amongst each other. Trades unionists must manage their own internal affairs as best they could amongst themselves.

Now your Lordships have to determine whether the plaintiff's action was duly brought before the Court, or whether

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it comes within the prohibition contained in s. 4 of the Act of 1871.

My Lords, we must first ascertain the purposes for which the action was instituted. The record affords us but little assistance. Save the writ there are no pleadings. But from the writ we gather that the action was brought by the plaintiff as a member of a registered trades union against that union and its officers for the purpose of restraining them by injunction from misapplying the funds of the association contrary to its rules and the provisions contained therein.

But the plaintiff, on his evidence given at the trial before Grantham J., stated that he had brought the action because, being entitled to the benefit of the funds of the trades union, he desired to protect them and have them used in a right way, and according to the rules of the association. The plaintiff also based his claim for an injunction on the ground that the defendants wrongly applied the funds of the association and intended to apply them in making payments to members of the union who had struck work, and that such strike was contrary to the rules of the association.

In order to sustain the case the plaintiff had to rely upon the rules of the union. These rules form the constitution of the association, and by these terms all the members of it are bound. Both the member's contributions and the benefits he is to receive are contributed by, and dealt with, under these rules, of which Nos. 2, 3, 64, and 65 are the principal in relation to this case.

Rule 2 states: "These rules shall be for the government of the association and the protection of the members." Rule 3 sets out the objects for which the union was established: (*a*) To raise funds for mutual help. (*c*) To secure the prices and wages bargained for by the members, and to protect members when unjustly dealt with by the masters or managers. (*g*) To provide a weekly allowance for the support of members and their families who may be locked out or on strike. (*h*) An allowance to all full members, half members, and members' wives at death who are financially on the books. (*j*) The whole of the moneys received by the association shall be

applied to carrying out the foregoing objects according to the rules. Then rules 64 and 65 provide for the conditions under which a strike might be constituted and carried on. Now these rules appear to me to constitute an agreement between the members of the union to the effect that it shall be carried on in accordance with the terms and conditions set out in such rules.

It now remains to be determined whether the suit is a legal proceeding instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits to members.

In substance the plaintiff is seeking to prevent the defendants from breaking the rules of the union, that is, from breaking the agreement created by those rules. He bases his claim to interfere upon the fact that he is entitled to participate in the distribution of the funds according to the rules. Vaughan Williams L.J. says: "The plaintiff does not claim to participate in the funds. There is no question as to his right to participate. He claims only to restrain misapplication of the funds." I do not think that this is correct. It is true that the plaintiff does not claim any immediate payment of money to him. But he does claim that he has the right to participate in the union funds under circumstances that may arise, and it is to protect such right of full participation that he has brought this action. His whole contention is that if the defendants continue improperly to expend the funds for strike purposes, he, the plaintiff, might be prevented from fully participating in them according to his right under the agreement contained in the rules.

In order to secure the maintenance of the fund the plaintiff has no other weapon than the enforcement of the agreement. If he were to say, "Give me so much money under the rules," it is admitted that that would be an enforcement of the agreement; equally so, I think, if he says, "Put so much money by to protect my rights within the rules." Then if he says, "Stop spending money in breach of the rules so that you may not deprive me of my rights," is he not equally enforcing the agreement? It cannot, I think, be said that in order to bring the action within s. 4 the claim must necessarily be for money to

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be at once paid to the plaintiff; and if this be not the extent of the limitation, I think the present action comes within the true and correct reading of the section. I do not forget that the word "directly" is to be found in s. 4 of the Act, and that effect has to be given to it. But this action appears to me to seek to "directly" enforce an agreement. The assertions on which the action is based are certainly direct: "I the plaintiff and you the defendants have entered into an agreement. You are about to break that agreement. I seek to prevent you, and I do so by asking the Court to enforce it."

Your Lordships' attention has already been called to the authorities bearing upon this case. On the one hand the judgments of Sir George Jessel in *Rigby* v. *Connol* (1) (where the plaintiff sought to restrain the trade union from expelling him), followed by that of Denman J. in *Duke* v. *Littleboy* (2), are cited in support of the defendants' contention, whilst the plaintiff can rely upon the judgment of Fry J. in *Wolfe* v. *Matthews* (3) and upon the judgment in the Scotch case of *M'Laren* v. *Miller*. (4)

In my opinion the judgment of Sir George Jessel, which has been recognised by the Court of Appeal in *Chamberlain's Wharf* v. *Smith* (5), bears directly upon the question now before your Lordships. That learned judge said: "I am satisfied that the agreement contained in the rules is an agreement to provide benefits for members, and that if I decide in favour of the plaintiff, I directly enforce that agreement, because I declare him entitled to participate in the property of the union, and the only property they have is their fines and subscriptions, and I restrain the society from preventing that participation. It seems to me that is directly enforcing the agreement; in fact, it is in substance directing and enforcing the specific performance of it, nothing more or less."

In my opinion there is no valid distinction between a suit to prevent the plaintiff from being deprived of participation in the funds by excluding him from membership, and a suit to prevent his being deprived of such participation by virtue of

(1) 14 Ch. D. 482.
(2) 49 L. J. (Ch.) 802.
(3) 21 Ch. D. 194.
(4) 7 R. 867.
(5) [1900] 2 Ch. 605.

the funds being wrongly taken away and wrongfully applied to other purposes.

For these reasons, my Lords, I have arrived at the conclusion that this action comes within s. 4 of the Act of 1871, and cannot be maintained. This view renders it unnecessary that I should deal with other points raised in the case. My judgment is thus in favour of the allowance of the appeal.

LORD ROBERTSON. My Lords, I am of opinion that the judgment appealed against is right.

My construction of the statute is that adopted by the Court of Appeal, and I cannot usefully add to what has been said by the learned judges there and by my noble and learned friends in this House in support of that view.

LORD LINDLEY. My Lords, before the Trade Union Act, 1871, was passed, trade unions were unincorporated societies, not recognised as legal, and in that sense, at least, they were held to be illegal on the ground that their objects were to restrain freedom of trade and were against public policy. Neither Courts of law nor Courts of equity would recognise or enforce the rules of such societies or the trusts on which their funds were held. By the Act in question trade unions were freed from the illegality which was the consequence of being regarded as against public policy (s. 2). Their rules and trusts can no longer be treated as invalid by reason of their being in restraint of trade (s. 3). They may be illegal or unenforceable on some other ground, and if they are the Act of 1871 does not in any way legalize them or affect them.

But the Act of 1871 does more for trade unions than remove the consequences of being regarded as illegal societies; it allows them to a great extent to manage their own affairs free from the control of the ordinary Courts of the country (s. 4), and enables them to register themselves under a name (ss. 13, 14, and 1st schedule), and to obtain summary redress against their officials in cases of misconduct (s. 12). Further, it enables them to hold property by trustees (s. 8), and enables the trustees to sue and be sued in respect of such property (s. 9).

One thing, however, the Act of 1871 did not do. It did not

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incorporate trade unions even when registered under the Act with a name. A trade union holds property by trustees; but not being incorporated there is no one legal person or entity in whom the beneficial interest in the property of a trade union is vested. The beneficiaries are its members collectively and severally. This is plain from s. 8, which vests the property of every registered trade union in trustees for the use and benefit of such trade union and the members thereof. A trade union is, and its name is only a convenient designation for, an unincorporated society of individuals, and this observation must not be lost sight of on the present occasion. Prior to the decision of this House in the *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (1), it was doubtful whether a registered trade union could sue or be sued in its registered name. The House decided that it could be so sued in an action for an injunction against its agents. But care was taken in that case to point out that a trade union is not an incorporated society, although it may be sued in its registered name.

The Trade Union Act, 1871, contains a carefully framed scheme to enable trade unions to acquire and to hold through the medium of trustees funds for the benefit of their members who, as already observed, are expressly mentioned in s. 8. Unless something can be found in the Act to the contrary, the natural legal inference would be that the ordinary equitable machinery for preserving the trust property and for executing the trusts on which it is held would be available for the members. Upon this point there is a valuable recent decision by Farwell J., *Stevens* v. *Chown* (2), where the older authorities will be found.

But it is said that s. 4 of the Act of 1871 expressly excludes the jurisdiction of the Courts from interfering in this case. I confess I cannot adopt this conclusion. Before turning to the section let me remind your Lordships what the object of this action is, and what the judgment appealed from really does.

The action is not to enforce a contract between the plaintiff and the defendants; its object is to vindicate a right to property. All trusts except those created by statute or by

(1) [1901] A. C. 426. (2) [1901] 1 Ch. 894.

will may be said to be created by a contract between the parties to the instrument creating the trusts. But those trusts can be enforced in equity by any person entitled to the benefit of them. A suit by a cestui que trust against his trustee is not what is usually understood as a proceeding to enforce an agreement; if it were, the suit could only be maintained by some person who was a party to the agreement creating the trust.

But, further, the object of this action is not to distribute funds held in trust for the members of the trade union, nor to obtain payment of any money out of them, nor in any way to administer those funds. The plaintiff, who is a member of the trade union, and who is beneficially interested in its funds, complains that those who have control of them threaten and intend to apply them to purposes not authorized by the rules of the association; and the whole object of the action is to obtain an injunction to restrain that intended misapplication of the funds. The order appealed from does this, and when properly understood does no more. Owing to the absence of pleadings, and to the fact that the order was drawn up by some one not accustomed to the forms used in the Chancery Division, the order is not in terms directed to the specific misapplication sought to be restrained, but is in quite general terms. But this is of no real importance when once the true object of the action is understood. The order is not a first step to ulterior proceedings with a view to administration. The action is at an end, except as regards this appeal and any breach of the injunction granted.

Such being the object of the action, and the effect of the order appealed from, let us see what there is in s. 4 of the Act which excludes the jurisdiction of the Court to entertain the action.

The words are: "Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements."

Pausing here for a moment, the words just quoted suggest the following observations: (1.) The section extends not only to

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Courts of law, but also to Courts of equity. (2.) The section does not prohibit any Court from exercising in any case jurisdiction which it could have exercised before the Act passed; the section simply prevents any Court from extending its jurisdiction, and interfering in cases in which the Act would authorize interference if it were not for the direct prohibition contained in the section. (3.) No legal proceeding which might be taken if the section did not prohibit it is prohibited, except a legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of the specified agreements. The word "directly" is important and limits the application of the section. Legal proceedings for other purposes than those specified are not prohibited, although they may indirectly affect agreements on which no action can be brought.

Passing now to the agreements specified in s. 4, those numbered 1, 2, 4, and 5 may be disregarded as clearly inapplicable to the present case. The third is the only one which has to be considered. The words are: "An agreement for the application of the funds of a trade union (*a*) to provide benefits to members, or (*b*) to furnish contributions . . . ., or (*c*) to discharge any fine . . . ."

My Lords, I am myself quite unable to see that these words include such an action as that which has been brought in this case. The object of this action is not directly to enforce any agreement for the application of the funds of the trade union in any of the ways specified under the third head. The object of the action is not to apply the funds, but to preserve them for future application; and to my mind this action is no more struck at by s. 4 than is an action brought by the trustees for the recovery of the funds of the trade union from some person wrongfully in possession of them.

My Lords, the question for decision is not new. It came before Fry J. in 1882 in *Wolfe* v. *Matthews* (1), and was decided in accordance with the above view, and so far as I know this case has never been questioned and has always been considered right. A similar view was taken of the Act in Scotland in *M'Laren* v. *Miller*. (2)

It is not in conflict with any other decision, unless it be

(1) 21 Ch. D. 194. (2) 7 R. 867.

Duke v. *Littleboy* (1) decided by Denman J. in 1880; but the object of the action in that case was wider than it was in *Wolfe* v. *Matthews* (2), and wider than it is in this case.

The cases in which the Court has refused to restore expelled members, namely, *Rigby* v. *Connol* (3) and *Chamberlain's Wharf, Ld.* v. *Smith* (4), are also distinguishable. The object of the action in each of those cases was directly to establish and enforce the plaintiff's rights as a member of the trade union to the benefits conferred by the rules on the members.

Considering the object of the action, it appears to me competent for any member who has a beneficial interest in the funds of the union to sue to prevent their application to purposes not warranted by the rules as they stand. It is true the rules may be altered (see rules 2 and 12), but it does not follow that the Court ought not to enforce the trust created by them as they stand. Stirling L.J. has fully dealt with this point, and I agree with him.

Upon the question whether the application of the funds of the society which has been restrained was authorized by the rules, I do not think it necessary to add anything. The strikers from the first were legally in the wrong, and they never got right. They cannot bring themselves within the rules 64 or 65.

I agree to the suggested form of the order. The appeal fails on all points, and ought to be dismissed with costs.

Order of the Court of Appeal discharged and order of the King's Bench Division varied as proposed by Lord Macnaghten: appeal dismissed with costs: cause remitted to the King's Bench Division.

Lords' Journals, April 14, 1905.

Solicitors: *Corbin, Greener & Cook, for Raley & Sons, Barnsley; Steadman, Van Praagh & Gaylor, for Arthur Neal, Sheffield; Marsh, Sherwood & Hart, for Carrington & Co., Barnsley.*

(1) 49 L. J. (Ch.) 802.
(2) 21 Ch. D. 194.
(3) 14 Ch. D. 482.
(4) [1900] 2 Ch. 60.

[HOUSE OF LORDS.]

H. L. (E.) 1905 March 24.

WEBSTER (PAUPER) . . . . . APPELLANT;

AND

SHARP & CO., LIMITED . . . . . RESPONDENTS.

Employer and Workman—Compensation—Partial Incapacity for Work—Maximum Amount of Compensation—Discretion of County Court Judge—Workmen's Compensation Act, 1897 (*c.* 37), *Sched. I., clauses* 1 (*b*), 2.

In awarding compensation under the Workmen's Compensation Act, 1897, Sched I., clauses 1 (*b*), 2, to workmen partially incapacitated for work, a county court judge cannot lay down any general rule as to the amount of compensation which he will award. The judge must exercise his discretion with regard to the circumstances of the particular case.

The decision of the Court of Appeal, [1904] 1 K. B, 218, affirmed by consent upon terms.

THIS appeal raised the point stated in the head-note.

The counsel for the appellant having stated the facts (which are fully set out in the report below), and argued that the decision of the Court of Appeal was wrong, it was agreed between the parties that that decision should be affirmed upon the terms that the respondents would waive their right to the costs below.

J. J. Wright (*H. C. Gutteridge* with him), for the appellant.
S. T. Evans, K.C., and *Minton Senhouse*, for the respondents.

EARL OF HALSBURY L.C. We think the county court judge had no right to lay down any such rule as he did lay down; he must decide each case on its merits. So far we affirm the judgment of the Court below. I move your Lordships that the order of the Court of Appeal be affirmed by consent of the parties, the respondents waving their right to costs.

LORDS MACNAGHTEN, JAMES OF HEREFORD, and LINDLEY concurred.

Order of the Court of Appeal affirmed by consent with a variation accordingly as to costs: cause remitted to the county court.

Lords' Journals, March 24, 1905.

Solicitors: *Wrenstead & Hind; Wynne-Baxter & Keeble.*

[HOUSE OF LORDS.]

CHARLES GRANT MACKENZIE AND ANOTHER . . . . . } APPELLANTS;

AND

WILLIAM ALLARDES AND OTHERS . . RESPONDENTS.

H. L. (Sc.) 1905 April 11.

Marriage Contract—Conquest—Wife's Acquirenda—Accumulations of Income—Legitim—Married Women's Property (Scotland) Act, 1881 (44 & 45 *Vict. c.* 21), *ss.* 7, 8—*Scottish Law.*

By ante-nuptial marriage contract executed in 1848 the wife bound herself to convey to trustees the whole funds and estate real and personal which she might hereafter "conquest and acquire by purchase succession or otherwise." The trustees were directed to pay the income of the trust estate to the wife during her life for her own separate benefit and use exclusive of the jus mariti, and by a clause in the contract the provisions in favour of children were to bar any claim they might make under the head of legitim:—

Held, affirming the decision of the Court of Session (1.), that the clause of conquest did not extend to estate which at the dissolution of the marriage by the death of the husband consisted of or was purchased with accumulations of the wife's separate income. (2.) That the only child of the marriage was not entitled to legitim out of his mother's estate.

APPEAL from a decision of the First Division of the Court of Session, Scotland. (1)

In 1848 Miss Phœbe Dunbar, who was then heiress of entail in possession of the entailed estate of Sea Park near Elgin, was married to Captain Edward Dunbar, and in view thereof the parties entered into an ante-nuptial contract of marriage. In addition to Sea Park, Miss Dunbar had a life-rent of the sum of 20,000*l.*, which had been left by her brother John Duncan for the purpose of purchasing land to be entailed in the same way as Sea Park, and she had also other estate which had been left her by her father and brother. By the marriage contract she conveyed to certain trustees her estate both generally and specifically. The conveyance contained two general descriptions including acquirenda, the first

(1) (1902) 5 F. 191.

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of which related to heritable estate only, and was as follows: "I the said Miss Phœbe Dunbar . . . . do hereby dispone . . . . to . . . . all and sundry lands and estate heritable bonds adjudications and all other heritable subjects of whatever kind or denomination or wherever situated presently pertaining to and belonging to me or which I may acquire or succeed to during the subsistence of the said intended marriage but excepting herefrom the foresaid estate of Sea Park." The second general description, which included both movable and heritable estate, was as follows: "I the said Miss Phœbe Dunbar with consent of my said promised husband and I the said Edward Dunbar for myself and we both with one consent hereby bind and oblige ourselves to dispone assign convey transfer and make and set over to and in favour of the said trustees and foresaids All and sundry lands heritages and sums of money funds goods and other estate real and personal which I the said Miss Phœbe Dunbar now have or at any time hereafter may conquest and acquire by purchase succession or otherwise other than the heritages to be acquired and settled by the trustees and executors of the said John Dunbar." The leading trust purposes were to pay the income to Miss Phœbe Dunbar during her life for her own separate benefit and use exclusive of the jus mariti, and after her death survived by her husband to pay the income to him, and on the death of the survivor to divide the whole trust estate among the children of the marriage other than the child succeeding to the entailed estates, or in the event of the child so succeeding being the only child of the marriage to pay the whole trust estate to such child. As regards legitim the marriage contract contained this clause: "And it is hereby further provided and declared that the settlement and destination of the furniture and others foresaid in the mansion-house of Sea Park in favour of the child of the said intended marriage who shall succeed to the estate of Sea Park and the other entailed property or funds and the provisions before written in favour of the other child or children of the said intended marriage shall be in full satisfaction to him her and them of all bairns' part of gear, executry and everything else which they could respectively claim or demand by and through the decease

of me the said Miss Phœbe Dunbar their mother on any ground whatever and not otherwise goodwill excepted only." In 1862 Mrs. Dunbar became entitled under the settlement of her brother John Dunbar to the life-rent of a sum of 20,000*l.* and also of the residue of his estate, which amounted to about 100,000*l.* Mainly in consequence of this bequest she was enabled to make large accumulations of income, which were from time to time invested in the purchase of land and other securities. This process of accumulations went on till the dissolution of the marriage by the death of Captain Dunbar on January 10, 1898. The only surviving child of the marriage was the appellant the Rev. John Archibald Dunbar Dunbar. Captain Dunbar, the husband, died on January 10, 1898. Mrs. Dunbar died on May 9, 1899, leaving estate heritable and movable valued at nearly 140,000*l.*, by far the greater part of which (about 120,000*l.*) it was admitted by both sides to have resulted from her accumulations of income. She also left a will, dated 1899, by which she conveyed her whole estate to trustees, directing them to pay a large number of legacies, and to apply the residue of her movable estate for the benefit of her niece, the respondent Mrs. Rivers, and her family. The bequests to the appellant, her son, were limited to certain movables valued at less than 10,000*l.* and the life-rent of the heritable estates, the fee of the latter going in default of issue of her son to the family of Mrs. Rivers.

In the circumstances the appellant, the Rev. John Archibald Dunbar Dunbar, raised an action of multiplepoinding in order to have it determined whether the estate left by Mrs. Dunbar was carried by the conveyance in her marriage contract, in which case it would entirely fall to him. This was the chief question debated at the bar. Claims were lodged by, inter alios, the predecessor of the appellant Charles Grant Mackenzie, judicial factor on the marriage contract trust, the appellant the Rev. A. Dunbar Dunbar, and the respondents, the trustees under Mrs. Dunbar's will. Besides the main question mentioned above, other questions were raised with regard to special properties and funds left by Mrs. Dunbar. The estate of Barluach was purchased in 1877 for 10,000*l.*, Mrs. Dunbar contributing

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from her accumulations rather more than half, and the remainder was from the funds of her husband. The title to the property was taken in the names of Captain and Mrs. Dunbar in conjunct fee and life-rent, and to the survivor and the heirs and assignees of the survivor. The appellants claimed that the share which vested in Mrs. Dunbar during the subsistence of the marriage was carried by the conveyance in the marriage contract in the same way as the other investments in which her savings were placed. A question, not much pressed, referred to a sum of 2000*l.*, not the result of accumulations, but which formed part of Mrs. Dunbar's brother's estate, and was at Mrs. Dunbar's disposal by writing or will. This sum was transferred to Mrs. Dunbar's private account by her order, and was intermixed with her accumulations. It was contended that Mrs. Dunbar's dealing with this fund did not amount to an exclusion of the marriage contract trustees. Another question related to the property of Glen of Rothes which was not, except to a very limited extent, derived from Mrs. Dunbar's accumulations, but from the 20,000*l.* left by Mrs. Dunbar's brother John. It appeared that in 1852 a portion of the 20,000*l.* had been expended in the purchase of the lands of Kinloss, while in 1869 the remainder was expended in the purchase of the estate of Glen Rothes. The price of the lands was 13,640*l.*, and in respect of that Mrs. Dunbar provided 1885*l.* towards the price, and had made advances to defray the expenses of her brother John Dunbar's trust to the extent of 471*l.* It was arranged that a portion of the estate representing 2306*l.* should be conveyed to her, while the remainder, representing a value of 11,334*l.*, was entailed in terms of John Dunbar's directions. The question concerned only the latter portion. Being entailed, it was excluded from the general clause of conveyance in the marriage contract; but then came an agreement between Mrs. Dunbar and the appellant, her son. It appeared that by agreement dated 1874 it was arranged that Mrs. Dunbar should, with the consent of her son, apply to the Court for the disentail of all the entailed estates held by her, and should thereafter irrevocably convey to her son in the event of his surviving the lands of Sea Park and

Kinloss and certain corporeal movables, and should convey to herself and her husband the lands of Glen of Rothes. The appellant maintained that in these circumstances Glen of Rothes was land acquired by Mrs. Dunbar within the meaning of the general clauses of conveyance in the marriage contract. Another question was whether the appellant, Mrs. Dunbar's son, was entitled to legitim from his mother's estate in view of s. 7 of the Married Women's Property (Scotland) Act, 1881, notwithstanding the clause given above in the marriage contract barring all claims for legitim on the part of the children of the marriage.

The Lord Ordinary (Lord Kincairney) on November 19, 1901, found (inter alia)—(1.) That the provision of conquest did not extend to the funds and estate vested in the testamentary trustees of Mrs. Dunbar which consisted of or were derived from the accumulations of income to which Mrs. Dunbar was entitled. (2.) That the said provision of conquest did not extend to accumulations after the dissolution of the marriage or to estate acquired after the dissolution of the marriage. (3.) That in particular it did not extend to the estate of Barluach. (4.) That the sum of 2000*l.* and the stock of the Aberdeen Railway Company, or the stock which had been substituted therefor, had been effectually conveyed and disposed of by the settlement of Mrs. Dunbar. (5.) That the lands of Glen of Rothes did not fall under the said provision of conquest.

The First Division of the Court of Session on December 4, 1902 (1), adhered to the Lord Ordinary's interlocutor, and decided on the above points in favour of the trustees under Mrs. Dunbar's will, holding on the main question that the savings made by Mrs. Dunbar from her income were not carried by the conveyance in her marriage contract, and, in the alternative, that the appellant, Mrs. Dunbar's son, was not entitled to legitim.

1904. Nov. 8, 10. *Salvesen, K.C.*, and *Constable* (both of the Scottish Bar), for the appellants. The decision of the

(1) 5 F. 191.

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Court below was erroneous. All Mrs. Dunbar's accumulations become subject at her death to the operation of the conveyance in her marriage contract. The term "conquest" must be read technically, and included every profitable addition to the estate which did not come by succession; and in particular included estate acquired by saving or economy: Erskine, 3, 8, 43; Bell's Prin. s. 1974; *Arthur and Seymour* v. *Lamb* (1), approved in this House in *Macdonald* v. *Scott* (2), and followed in *Gillon's Trustees* v. *Gillon*. (3) Mrs. Dunbar might have spent her accumulations during her life; the obligation only applies at her death. As she did not spend the accumulations, they fell under the marriage contract: see English case, *Lewis* v. *Madocks*. (4) The decisions in *In re Bendy* (5) and *Finlay* v. *Darling* (6) are not reconcilable. Then as to Glen of Rothes, this was acquired property. If it had not been disentailed it would have passed to the son. As to legitim, if the money Mrs. Dunbar left is excluded from the marriage contract then the appellant, Mrs. Dunbar's son, is entitled to one-half of the accumulations under the Act of 1881 (44 & 45 Vict. c. 21), s. 7. The clause in the marriage contract barring legitim cannot be read as an exclusion of a right which was unknown at the date of the marriage contract—namely, in 1848—to the law. Support for this contention is given by the cases of *Scott* v. *Edmond* (7) and *Dunbar's Trustees* v. *British Fisheries Society*. (8) *Simons' Trustees* v. *Neilson* (9) and *Murray's Trustees* v. *Murray* (10) are important cases on the Married Women's Act, 1881; but they refer to funds within the scope of the marriage contract, and for the purposes of this point the fund here is outside the scope of the marriage contract.

[They also cited *Barron* v. *Mitchell* (11) and *Champion* v. *Duncan* (12), and commented on *Boyd's Trustees* v. *Boyd* (13),

(1) (1870) 8 M. 928.
(2) [1893] A. C. 642.
(3) (1890) 17 R. 435, 441.
(4) (1803) 8 Ves. 149; (1810) 17 Ves. 48; 7 R. R. 10.
(5) [1895] 1 Ch. 109.
(6) [1897] 1 Ch. 719.
(7) (1850) 12 D. 1077.
(8) (1878) 3 App. Cas. 1298.
(9) (1890) 18 R. 135.
(10) (1901) 3 F. 820.
(11) (1881) 8 R. 933.
(12) (1867) 6 M. 17.
(13) (1877) 4 R. 1082.

Morris v. *Anderson* (1), and *Young's Trustees* v. *Young* (2), relied on by the respondents.]

Haldane, K.C., and *Guthrie, K.C.* (with them *Moncrieff*), (the two latter of the Scottish Bar), for the respondents. The property settled is settled once for all, and the operation of the settlement is exhausted when the trustees pay over the income to Mrs. Dunbar: *Churchill* v. *Denny*. (3) Mrs. Dunbar acquired nothing except what she obtained immediately under the settlement. The income was paid to her and, speaking generally, she left it in the bank till her death. To come within the obligation of the contract the fund must be a conquest and acquisition making Mrs. Dunbar's estate so much larger than it was in the settlement: see *Morris* v. *Anderson* (1), *Finlay* v. *Darling* (4), *Clutterbuck's Settlement* (5), *Scholfield* v. *Spooner* (6), and *Boyd's Trustees* v. *Boyd*. (7)

In the present case the word "conquest" is used in a flexible rather than a technical sense, and falls to be interpreted so as to give effect to any indication appearing on the face of the deed: *Diggens* v. *Gordon*. (8) The clause which declares that the income shall be received by Mrs. Dunbar from the trustees (to whom it has already been conveyed by her) for her separate benefit and use clearly indicates an intention adverse to the appellant's construction of the word "conquest." The word "acquire" is the sovereign word, and is not restricted nor enlarged by the juxtaposition of the word "conquest." As to Glen of Rothes estate, the son entered into a bargain with his mother and cannot go back from it. Then the appellant is not entitled to legitim: see s. 8 of the Married Women's Property (Scotland) Act, 1881, and *Buntine* v. *Buntine's Trustees* (9); *Murray's Trustees* v. *Murray*. (10)

Salvesen, K.C., in reply.

LORD MACNAGHTEN. My Lords, the questions involved in this appeal depend upon the terms of an ante-nuptial contract

(1) (1882) 9 R. 952.
(2) (1892) 20 R. 22.
(3) (1875) L. R. 20 Eq. 534.
(4) [1897] 1 Ch. 719.
(5) [1905] 1 Ch. 200.
(6) (1884) 26 Ch. D. 94.
(7) 4 R. 1082.
(8) (1867) L. R. 1 H. L., Sc. 136.
(9) (1894) 21 R. 714.
(10) 3 F. 820.

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dated October 13, 1848, made in contemplation of a marriage then intended, and shortly afterwards solemnized, between Captain Edward Dunbar and Miss Phœbe Dunbar of Sea Park. Miss Phœbe Dunbar was heiress in possession of the entailed estate of Sea Park, and a lady of considerable means besides. The settlement effected by the contract was a settlement of property which belonged to her at the time, but it also contained a clause of conquest and acquirenda. Mrs. Dunbar, who survived her husband, is now dead. In addition to the fortune which was hers at the date of the marriage, she became entitled to a life interest in a large sum of money under the will of a brother who died in 1862. At her death she was possessed of personal estate of the value of more than 100,000*l.*, made up of savings or accumulations of income derived from her life interest under her brother's will and the interest of the funds specifically comprised in her marriage settlement. By her will she left the moneys which she had thus accumulated away from the appellant, the Rev. John Archibald Dunbar Dunbar, who was the only surviving child of the marriage, but apparently, in her opinion, amply provided for otherwise.

It was contended on behalf of Mr. John Archibald Dunbar Dunbar that these accumulations of income as and when laid out on investments of a permanent character, or, at any rate, as from Mrs. Dunbar's death, became, by virtue of the clause of conquest and acquirenda, subject to the trusts of the settlement of 1848, and that consequently it was not competent for Mrs. Dunbar to deal with them by will. That was the principal claim advanced on behalf of the appellant. There was also a claim to a property called the Glen of Rothes, and there was a claim to legitim under the Married Women's Property (Scotland) Act, 1881. On these three questions and on some minor points, which were not raised at your Lordships' bar, the learned judges in Scotland unanimously rejected the appellant's claim. Agreeing as I do in the result at which they have arrived, I will not trouble your Lordships by dealing with the case at any length.

As regards clauses in marriage contracts providing for the

settlement of after-acquired property, I quite agree that effect must be given to the intention of the parties apparent on the face of the contract construed fairly, although the result may seem to be whimsical or even unreasonable. But still there are some considerations which it is as well to bear in mind as aids to the construction of such clauses. These considerations may, of course, be excluded either designedly or accidentally by the language used, but unless they are so excluded they are, I think, of general, if not universal, application. One is that change of investment—mere alteration in the outward form of property—is not "acquisition" within the meaning of a provision of this sort. Another is that property which has reached its destination through the medium of the trust, or property which, in accordance with the declarations of the parties to the contract, comes to be at the absolute disposal of one of those parties, does not again fall under the operation of the trust unless there is a clear direction to that effect. In the present case I cannot find in the marriage contract of 1848 any indication that money, which under or in accordance with the trust would come to the hands of Mrs. Dunbar—money which was to be hers to hoard or spend, to waste or save, just as she pleased—was under any circumstances or in any event to be brought back under the operation of the trust and pass through the mill again. Such a result seems inconsistent with provisions carefully made to safeguard her separate use and enjoyment of the income which was originally her own. It is, I think, opposed to the whole scope of the instrument.

The clause in question is called a clause of conquest, and the word "conquest" occurs in it. But the word is used as a verb, and not as a substantive. So used, it has not apparently the strict technical meaning to be ascribed to it when used as a substantive. A clause of conquest, though perhaps a somewhat rude and rough form of provision for the issue of the marriage, is intelligible enough when the husband is the settlor; but according to the view expressed in this House in the case of *Diggens* v. *Gordon* (1) it is not, or at any rate was

(1) L. R. 1 H. L., Sc. 136.

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not at the date of the contract now in question, properly speaking, applicable where the settlement is by the lady. In the case of a settlement on the part of the wife, the word "conquest" adds little or nothing to the force of the word "acquire" when used in conjunction with it. Here, I think, the word "acquire" is the governing word. The expression "conquest" is, as it seems to me, merely redundant and tautological.

An argument was founded on the expression "acquire by purchase." But there, again, I think that the words "by purchase, succession, or otherwise" add nothing to the force of the word "acquire," and that, whatever the meaning of the draftsman may have been, there must have been an "acquisition" properly so called in order to bring any subject within the operation of the clause. There must be something got from an external source.

As regards the lands of the Glen of Rothes and the question of legitim, I have nothing to add to the observations of the learned judges in the Courts below.

It only remains for me to move that the appeal be dismissed with costs.

LORD DAVEY. My Lords, the first and principal question on this appeal is whether certain investments of the savings made by the late Mrs. Dunbar Dunbar from her separate income are bound by a clause of acquirenda in her marriage contract. She was entitled to the income partly under the marriage contract itself and partly under the will of her brother, who died during the subsistence of the marriage.

The marriage contract is dated October 13, 1848, and, after a conveyance by the lady of certain specified subjects, it contains a clause whereby Mrs. Dunbar Dunbar, with the consent of her intended husband and Captain Dunbar Dunbar for himself, and they both obliged themselves to dispone, assign, convey, &c., to the trustees all real and personal estate which the lady then had or at any time thereafter might "conquest and acquire by purchase, succession, or otherwise." The first trust of the settled property other than the furniture, plate, and so forth

in the mansion-house of Sea Park was to pay the annual income to the lady for her life for her separate use, exclusive of the jus mariti of her intended husband or any future husband.

Captain Dunbar Dunbar died on January 10, 1898, and Mrs. Dunbar Dunbar died on May 9, 1899, leaving a son, the Rev. Archibald Dunbar Dunbar, the only issue of the marriage surviving.

It has been decided in Scotland that a life interest in income is primâ facie not comprised in a clause of acquirenda: *Boyd's Trustees* v. *Boyd*. (1) And the same has been held in England: *Briggs* v. *White* (2); or if it is expressly included, it follows the destination of the trust income: *Scholfield* v. *Spooner*. (3)

I was, I confess, rather surprised to hear it argued that, apart from any technical meaning to be attached to the word "conquest," the savings from a wife's separate income became subject to an ordinary acquirenda clause or covenant for settlement of after-acquired property. This proposition was said to be supported by Lord Eldon's opinion in *Lewis* v. *Madocks* (4) and the recent case of *In re Bendy*. (5) When *Lewis* v. *Madocks* (4) is examined, I do not think it can be cited as an authority for that purpose. There was a covenant by a husband to convey by deed or will all his personal estate to the use of himself and his intended wife, and the survivor subject to the payment of a sum of money on the death of the survivor to the children of the marriage. Lord Eldon said during the argument that he could not adopt the construction that annual produce was properly acquired in the sense of the bond, but he added, except only to the extent "in which the husband himself might think proper to lay up that produce as capital"; and in the course of his judgment he said that certain sums must be considered as "personal estate," "capital, even if composed of savings."

The point, however, does not appear to have been necessary for the actual decision, and the case was a very special one. The weight of it as an authority is considerably diminished by

(1) 4 R. 1082.
(2) (1848) 22 Beav. 176, n.
(3) 26 Ch. D. 94.
(4) 8 Ves. 149; 17 Ves. 48; 7 R. R. 10.
(5) [1895] 1 Ch. 109.

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Lord Eldon's remark when the case first came before him in 8 Ves. at p. 156, that if the Court finds a solid subject of personal property they would attach it rather than render the covenant perfectly nugatory, though they did not know what to do with the argument shewing the absurdity of it. My Lords, I entirely agree with the very clear and convincing judgment of Romer L.J. in *Finlay* v. *Darling* (1), and hold with him that savings from income not expressly included in a covenant for settlement of after-acquired property do not fall within the covenant, and the wife retains the control and power of disposing of such income. Romer L.J.'s opinion is supported by that of Buckley J. in the recent case of *Clutterbuck's Settlement.* (2) The same point arose in Scotland in *Young's Trustees* v. *Young* (3); but it was held to be not proved that the investments in question were made out of savings of the wife's income. There was, therefore, no decision. But it seems to have been assumed by some of the learned judges that if it had been proved the investments would have been outside the clause of acquirenda.

The point, therefore, is narrowed to the question whether the word "conquest" in the deed is used in a technical sense, and what is the effect if that be so. On this question the decision in the case of *Diggens* v. *Gordon* (4), which was confirmed in this House, appears to me important. "The word 'conquest' used substantively," says Professor Bell, "comprehends whatever is acquired, whether heritable or movable, during the marriage by industry, economy, purchase, or donation," and it may be assumed to bear an analogous, but perhaps more elastic, meaning when used as a verb. Properly speaking, conquest is applicable only to the husband, and cannot in any legitimate sense be applied to the wife, as explained by the Lord Justice-Clerk in *Diggens* v. *Gordon.* (4) This does not carry you very far, because it may yet be a technical word improperly applied, as distinguished from a word used in a non-technical sense. What is more important is that in a proper provision of conquest the title of the husband is not

(1) [1897] 1 Ch. 719.
(2) [1905] 1 Ch. 200.
(3) 20 R. 22.
(4) 3 M. 609; L. R. 1 H. L., Sc. 136.

affected during the subsistence of the marriage or during his own life after its dissolution. He remains the unlimited fiar of his property, except that he cannot defeat the provision by a gratuitous disposition in fraud of his contract. In the marriage contract now under consideration, on the contrary, the property is to be at once on the accruer of the wife's title conveyed to the trustees of the settlement, and to be placed in their management for the purposes of the settlement. In the judgments of the Lord Justice-Clerk and Lord Cowan in the Court of Session, and of Lord Cranworth and Lord Colonsay in this House in *Diggens* v. *Gordon* (1), this circumstance was treated as conclusive that the word was not used in any technical sense. I see no valid reason for not adopting those opinions in the present case.

In *Diggens* v. *Gordon* (1) the question was whether property which the wife took by succession during her coverture was bound by the clause. The words were "conquest or acquire," which certainly lent themselves to a distributive construction more easily than the words before your Lordships. It might have been said that the lady "acquired the property if she did not conquest it." That may be true. But it appears to me from a perusal of the judgments in the Court of Session and in this House that the decision was, in fact, based on the ground that the word conquest was not used in any technical sense, and it is a decision to that effect.

The appellants also placed reliance on the use of the word "purchase" in the clause under consideration, which they contended was meaningless if it was not intended to include property purchased by Mrs. Dunbar Dunbar out of her income. Your Lordships were told that this word is found in the common form provision of conquest from which this clause was adapted by the draftsman. But what I wish to point out is that the word "purchase" is equally destitute of any real meaning in a proper provision of conquest. If the moneys laid out in the purchase were not already subject to the clause, the purchased property will not become so; and inversely the investment of moneys which are not the subject of conquest

(1) L. R. 1 H. L. Sc., 136.

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will not make them so. If a man has an estate before marriage and sells it during the coverture, and buys another, or if he invests money coming to him from a succession in Consols, the new estate or the Consols will not (I presume) become "conquest"; and, on the other hand, if he accumulates his savings in a money-box or a bank, or in any of the traditional modes, the fund is (I presume) equally "conquest at the time of his death," though he has not laid it out in an investment. I am content to say with the Lord Ordinary that it is difficult to find any satisfactory meaning for this word, but I am unable to hold that it adds anything to the argument that savings from income were included in the provision under consideration.

I am, therefore, of opinion that the appeal fails on the first and principal point. The only other points argued by the appellants at your Lordships' bar were—(1.) as to the lands of Glen of Rothes, and (2.) as to the Rev. Archibald Dunbar Dunbar's claim to legitim out of his late mother's estate. On the former I agree with the Lord President that there was sufficient consideration to support the agreement made between Mrs. Dunbar Dunbar and her son as a family arrangement. In such cases the Court does not weigh the amount of consideration in golden scales, and there being no claim for reduction of the agreement the Court is bound to give effect to it. I also agree with the Lord President that the claim for legitim is excluded by clause 7 of the marriage contract, notwithstanding that the claim can only be made under the Act of 1881. The words of the clause are perfectly general, and are, I think, intended to exclude every claim which the children of the marriage might otherwise make through the death of their mother at the time when that event happened.

I am of opinion that the appeal fails altogether, and should be dismissed with costs.

LORD ROBERTSON. My Lords, I have grave doubts of the judgment under review. But the Court below was a very strong one, each of the learned judges being singularly well equipped in this region of the law of Scotland. Accord-

ingly, I do not dissent from the motion that the appeal be dismissed.

LORD LINDLEY. My Lords, in 1848, upon the marriage of Captain Dunbar and Miss Phœbe Dunbar, property of hers and land which she might afterwards acquire was vested in trustees upon certain trusts, which included a trust for her sole and separate use for her life; and by the settlement it was provided that all the property, real or personal, which she then had or should at any time thereafter "conquest and acquire by purchase, succession, or otherwise" (with a specified exception) should be conveyed or assigned to the trustees of the settlement, to be held by them on the trusts therein declared. The husband died in January, 1898, and his wife died in the following year. The main question before your Lordships is whether property purchased by the wife with income paid to her during her marriage, and to which she was entitled for her separate use, became on her death subject to the dispositions of her will, or whether it became vested in the trustees of the settlement for the benefit of a child of the marriage. The Court of Session has decided this question in favour of the persons claiming under her will, and against the trustees of the settlement.

My Lords, any other decision appears to me entirely inconsistent with the trust for the separate use of the wife during her life. By virtue of this trust the income which became payable to her became her own property absolutely, and the trustees had no claim to it as against her. She was at perfect liberty to spend that income, if she chose, or to save it and invest it in Government or other stocks or securities, or in the purchase of land. As long as she retained it, or any investment or property bought with it, she could dispose of it, or what was bought with it, as she thought proper by act, inter vivos, or by will.

The conveyance of after-acquired land did not comprise land bought by her with the income to which she was entitled for life for her separate use under that settlement. The subsequent provision for settling after-acquired property must, in

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my opinion, be construed in like manner so as to preserve her rights under the trust for her separate use, and not so as to destroy those rights or any of them. Wide as the provision is, it cannot possibly include the income which it is the duty of the trustees to pay over to her; and why, if that is so, they should be able to follow the income and claim what she may have purchased with it passes my comprehension. As a matter of principle I concur entirely with the view taken by Romer L.J. in *Finlay* v. *Darling* (1), in which a similar point arose on an English settlement.

But the law of Scotland may, of course, be different; and it was strenuously contended by counsel for the appellants that the use of the word conquest (which has a technical meaning in Scottish law) shewed that property bought by the lady out of her savings, and held by her at her death, could not be disposed of by her by her will, but became subject to the trusts of the settlement, and counsel cited a number of Scotch decisions in support of that contention.

My Lords, the word conquest in this settlement has to be applied to the property of the wife and to property which, under the settlement, belonged to her for her separate use. Moreover, the word conquest does not occur alone; the phrase is, "conquest and acquire by purchase, succession, or otherwise." The whole phrase includes every mode of acquisition, and points to some future acquisition by which her property was increased before it became subject to the trusts of the settlement; in other words, the phrase points to some property in addition to that to which the lady was entitled at the date of the settlement, and in addition to any property to which she was entitled under the settlement itself. Any other construction deprives her of the right to dispose of her own property under the trust for her separate use. If any confirmation of this view is required, it is, I think, to be found in the clause in the settlement by which Captain Dunbar renounced all claims to property which his wife might acquire during the subsistence of the marriage, whether or not such acquisitions were settled on the trusts of the settlement. This

(1) [1897] 1 Ch. 719.

points to the possibility of her acquiring property which was not to be brought into settlement, and would include such as she might purchase with her own separate income. But I do not myself attach importance to this clause.

As regards the Scotch decisions, I can discover no case in which it has been held that property purchased by a wife with money belonging to her for her separate use under her marriage settlement falls within a clause in it binding her to bring her after-acquired property into the same settlement. The nearest authority on the point is *Young's Trustees* v. *Young* (1), and that somewhat supports the opposite view; but it cannot be regarded as a decision in favour of the respondents. In the absence of any authority settling the question in favour of the appellants, and thinking that their contention is wrong on principle, I have come to the conclusion that their appeal on the main point ought to be dismissed.

As regards the Glen of Rothes property, I also have arrived at the conclusion that the appellants are wrong. This property was acquired by the wife in exchange for part of the Sea Park property which belonged to her and her son, and was expressly excluded from the settlement. The exchange was the result of a family arrangement to which her son was a party, and in my opinion the terms of this arrangement were such as to exclude any claim by the son to this Glen of Rothes property.

There remains the claim of the son to legitim, i.e., half of his mother's unsettled personal property. His claim is based upon the fact that he acquired this right under a statute passed after the settlement was made, namely, 44 & 45 Vict. c. 21. But the settlement contains a clause to the effect that the provision made by it for the children of the marriage shall be in full satisfaction of all "bairns' part of gear, executry and everything else which they could respectively claim or demand by and through the decease of their mother on any ground whatever." These words are so wide as, in my opinion, to exclude the children of the marriage from all claims foreseen

(1) 20 R. 22.

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and unforeseen to any share of their mother's personalty except under the settlement.

In my opinion the decision appealed from was correct on all points, and the appeal ought to be dismissed with costs.

Ordered that the appeal be dismissed with costs.

Lords' Journals, April 11, 1905.

Agents for appellants: *Martin & Leslie, for Thomas Henderson, W.S., Edinburgh.*

Agents for respondents: *Gellatly & Son, for Stuart & Stuart, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1905 *April* 14.

CHR. SALVESEN & CO. . . . . APPELLANTS;

AND

REDERI AKTIEBOLAGET NORDSTJERNAN AND OTHERS. . . . . } RESPONDENTS.

Principal and Agent—Untrue Statements by Agent—Measure of Damages—Ship.

Where an agent employed to conduct negotiations for his principals makes an incorrect statement to them that he has concluded a contract on their behalf, the measure of damages for his breach of duty is the loss actually sustained by the principals in consequence of the misrepresentation, and does not include profits that the principals might have made if the representation had been true.

The respondents employed the appellants to find freight at a certain rate per ton for one of the respondents' ships. The appellants reported that they had concluded a bargain for the charter of the vessel. In fact, no bargain had been concluded; differences which the appellants had hoped to get rid of existed and proved invincible. Three days after the report of the transaction the respondents learned that the proposed charterers had refused to proceed with the charter. On receiving this information the respondents made no effort to look for an equally advantageous freight, but used their ship under a current contract at a

much lower rate per ton. The respondents first brought an action against the alleged charterers, and then against the appellants, claiming in effect the difference between the two rates of freight as damages:—

Held, altering the decision of the Second Division of the Court of Session, that the main part of the claim was untenable, but that the respondents were entitled to damages for trouble which they had incurred, outlays on telegrams and the like; and that they were also entitled to the expenses of their action against the alleged charterers down to the closing of the record.

Cassaboglou v. *Gibbs*, (1882) 9 Q. B. D. 220; (1883) 11 Q. B. D. 797, affirmed.

Collen v. *Wright*, (1857) 7 E. & B. 301; 8 E. & B. 647, distinguished.

APPEAL from the Second Division of the Court of Session, Scotland. (1)

The appellants were shipbrokers in Leith. The respondents, who carried on business at Stockholm, were the owners of the SS. *Oscar II.*, and they sued the appellants for damages incurred through the appellants' alleged "breach of duty and wrongous actings and representations" in the course of negotiating a charter for that vessel. Stated generally, the course of the correspondence (mostly by telegrams) was as follows: On November 28, 1898, the respondents telegraphed to the appellants stating that the *Oscar II.* would be ready about December 8 for a coal charter from the East Coast of England to Sweden, subject to quick loading and discharging, the freight to be 8*s.* a ton. This offer the appellants on November 29 transmitted to Messrs. Ireland & Son, asking them to name their quickest time for loading and discharging. Messrs. Ireland replied the same day, offering to charter the vessel upon certain terms for a voyage—Burntisland to Stockholm. This offer was passed on by the appellants to the respondents, who replied that the vessel owing to her size was unable to load from Burntisland, that the rate of discharge required was 600 tons a day, and that loading time must count from arrival without waiting turn. The appellants at once passed on the owners' terms to Messrs. Ireland, who on November 30 replied offering a freight of 7*s.* 6*d.* from Methil or Granton, 120 hours to be allowed for loading, the rate of discharge inserted in the

(1) (1903) 40 S. L. R. 305.

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charterparty to be 600 tons a day, on the understanding, however, that the charterers should be under no liability for demurrage if 500 tons a day were discharged. On receipt of this offer the respondents replied, insisting on a freight of 8*s.* and on a discharge of 600 tons per day without qualification. These terms Messrs. Ireland declined, but on December 1 made a new offer in which they adhered to their position as to freight 7*s.* 6*d.* and discharge clause, but altered the loading time to "96 berthed"—that is, undertaking to complete the loading in ninety-six hours after the ship was berthed. The appellants wired out to the respondents, who gave way as to the freight but not as to the discharge clause. The appellants alleged that the course of the above negotiations shewed that with respect to one term of the proposed charter, to wit, the time to be allowed for loading, the proposals of the owners and charterers were proceeding on different bases, the respondents insisting that the loading time should count from arrival, Messrs. Ireland that it should run from the time of berthing. The appellants accordingly, in order, as they alleged, to adjust this difference and afford a further basis for negotiations in sending out to the respondents Messrs. Ireland's offer, translated the latter's berthing terms into its equivalent loading time—time counting from arrival, namely, "144 loading, no turn." The appellants alleged that they were aware from the then state of the trade that the loading port would be comparatively free from shipping at the date of the *Oscar II.'s* expected arrival, and that accordingly 144 hours after arrival was equally favourable to the charterers as the terms demanded by them, namely, ninety-six hours after berthing.

The respondents in reply to this offer adhered to their former terms—namely, ninety-six hours after arrival, with a discharge at the rate of 600 tons a day; and on these terms being intimated to Messrs. Ireland on December 2 they declined to charter the ship.

The appellants at once intimated to the respondents that their conditions had proved unworkable, and asked for authority to negotiate upon the footing that 144 hours after arrival should be allowed for loading.

In reply the respondents authorized the appellants to modify their loading terms to 120 hours after arrival; but Messrs. Ireland declined to vary their former terms—namely, ninety-six hours after berthing. The respondents on December 3 again renewed the offer; but Messrs. Ireland on December 5 again declined to negotiate on the footing that loading time should run from arrival, and repeated their former terms for discharge, namely, 600 tons per day, to be inserted in the charter, but without liability on the charterers if 500 tons were discharged.

It thus being evident that neither party would give way as regards terms of loading, and that there was accordingly no possibility of any contract being concluded, the appellants alleged that in accordance with what is a known practice in the trade, and knowing that owing to the state of the turn at Methil there was no practical difference between 120 hours after arrival and ninety-six hours after berthing, they resolved that they themselves would take the risk of the difference, and thus enable a charter to be effected. The manner in which this would have worked out in practice was thus explained. The appellants, had the charter to Messrs. Ireland gone through, would as agents for the respondents have executed a charter containing Messrs. Ireland's loading terms—namely, ninety-six hours after berthing—and forwarded it to Messrs. Ireland for signature. The copy of the charter in similar terms forwarded by the appellants to the respondents would, however, have been accompanied by the appellants' guarantee that the vessel would not be detained beyond the loading time stipulated for by them—namely, 120 hours after arrival. The respondents, as the appellants knew and as a witness for the respondents admitted, would have been perfectly satisfied to accept the appellants as the responsible parties under the charter. The appellants accordingly on December 5 wired to the respondents in the following terms: "*Oscar* fixed discharging 600 inserted charter but not responsible demurrage over 500 instant confirmation better impossible." And on the evening of the same day the appellants intimated to Messrs. Ireland that their terms were accepted as arranged.

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On the same day the respondents wired the appellants: "Confirm *Oscar* Methil Stockholm 7*s.* 6*d.* conditions as per our telegrams first third agree proposal discharging if necessary *Oscar* expected Rotterdam to-morrow captain telegraphs you expected Methil about Saturday." The appellants thereupon wired and also wrote Messrs. Ireland that their offer was accepted on their own terms—namely, ninety-six hours after berthing—and that a charter would be posted for signature on the following morning. On receipt of this telegram Messrs. Ireland wrote as follows to the appellants, refusing to proceed further with the charter:—

"9.30 P.M., 5th December 1898.—We have received your telegram late this evening, and sorry it came so late, as only an hour ago we had a wire from Stockholm cancelling the 5000 boat, and that they had arranged otherwise, so therefore we will have to be off with this boat. The owners have spoiled this business by hanging off so long."

The appellants on the following morning, December 6, wired Messrs. Ireland declining to accept the latter's refusal; but Messrs. Ireland adhered to their refusal, stating that "the owners had delayed too long, as we found it impossible in face of the scarcity of wagons to secure enough cargo to load" the vessel. The ship was at this time discharging cargo at Rotterdam, and could not have been ready to load at Methil on the 8th, but might have been ready "about" that date. After some further correspondence the respondents employed the vessel upon another voyage under a current contract at 5*s.* per ton instead of 7*s.* 6*d.* The difference between these freights formed the major part of the damages claimed by the respondents.

On July 13, 1899, the respondents instituted an action against Messrs. Ireland for breach of contract. Messrs. Ireland contended that there was no completed contract. Thereafter the action against Messrs. Ireland was abated; and the respondents raised this action against the appellants to recover damages.

On April 16, 1902, the Lord Ordinary (Lord Pearson) gave judgment in favour of the respondents, holding that they were

(1.) entitled to 416*l.* 18*s.* 9*d.*, the difference in value between freight at 7*s.* 6*d.* a ton under the alleged contract with Messrs. Ireland and 5*s.* per ton actually earned by the vessel, and expenses of telegrams 33*l.* 1*s.* 3*d.*, or total damages amounting to 450*l.*; (2.) the costs incurred by the respondents in their action against Messrs. Ireland. On this latter head the Lord Ordinary was of opinion that the letters passing between the appellants and respondents justified the respondents in raising that action and insisting in it until the record was closed.

On January 16, 1903, the Second Division of the Court of Session affirmed the Lord Ordinary's judgment. (1)

1904. Nov. 10, 11, 15. *Scott Dickson, L.A.*, and *Salvesen, K.C.* (with them *Charles D. Murray*), (all of the Scottish Bar), for the appellants. The appellants were agents of the respondents alone—*Cassaboglou* v. *Gibbs* (2)—and not of Messrs. Ireland, the proposed charterers, nor were they understood by the respondents to be so acting, nor did the appellants at any time represent themselves to be acting as Irelands' agents. In the English cases—*Collen* v. *Wright* (3)—the party making the representation was in fact the agent and represented that he had an authority, not of the pursuer, but of the other party to the alleged contract.

[EARL OF HALSBURY L.C. Suppose you told them that there was a contract and there was not one.]

The special circumstances affect the measure of damages. This measure is different if it is only a mistake between agent and principal. Here the damages have been assessed on the wrong principle. If it were true that the respondents lost several contracts, then the appellants are liable for that loss; but the evidence proved that the respondents' position was not altered for the worse, nor did they sustain any actual loss or expense between the brief period which elapsed between the despatch by the respondents of their so-called acceptance and the receipt of Messrs. Ireland's refusal. The alleged damage must be regarded as truly the result of the

(1) 40 S. L. R. 305. (2) 9 Q. B. D. 220; 11 Q. B. D. 797.
(3) 7 E. & B. 301; 8 E. & B. 647.

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respondents' own act. The evidence clearly shewed that employment of an equally remunerative character was open for the vessel: *Dickson* v. *Reuter's Telegram Co.* (1) But instead of endeavouring to obtain it the respondents sent the vessel without further inquiry to fulfil an old current contract at 5*s.* per ton, in which contract there was no obligation binding them to do so. Further, there was no completed formal contract with Messrs. Ireland: Stamp Acts, 1891 (54 & 55 Vict. c. 39), s. 15; 1884–5 (48 & 49 Vict. c. 51). If the rate of freight and time for loading and discharge had been agreed to, it was still possible that the whole matter might have gone off on less material points. Again, the appellants cannot be liable for the costs of the action against Messrs. Ireland. Before that action was raised the respondents were in possession of the whole facts, and in this knowledge they elected to sue Messrs. Ireland, and to sue them on a contract to the terms of which it was clear Messrs. Ireland had never consented.

[They also cited *Starkey* v. *Bank of England* (2); *Eastwood* v. *Bain* (3); *Hughes* v. *Graeme.* (4)]

Scrutton, K.C., and *John G. Spens* (the latter of the Scottish Bar), for the respondents. No liability was admitted in the Court below. Now the appellants admit some liability. The facts bring the case within *Collen* v. *Wright* (5); *In re National Coffee Palace Co.* (6); *Meek* v. *Wendt & Co.* (7); *Suart* v. *Haigh* (8); *Simons* v. *Patchett* (9); *Hughes* v. *Graeme* (4); *Spedding* v. *Nevell* (10); *Godwin* v. *Francis* (11); *Richardson* v. *Williamson* (12); *Firbank's Executors* v. *Humphreys.* (13) The appellants actually misrepresented the facts. Contrary to the appellants' assertions, Messrs. Ireland never had agreed to charter the vessel on the only terms the respondents had authorized. Therefore the appellants must make good any loss the respondents have sustained following on Messrs.

(1) (1877) 3 C. P. D. 1.
(2) [1903] A. C. 114.
(3) (1858) 28 L. J. (Ex.) 74.
(4) (1864) 33 L. J. (Q.B.) 335.
(5) 8 E. & B. 647.
(6) (1883) 24 Ch. D. 367.
(7) (1888) 21 Q. B. D. 126.
(8) (1893) 9 Times L. R. 488.
(9) (1857) 7 E. & B. 568.
(10) (1869) L. R. 4 C. P. 212.
(11) (1870) L. R. 5 C. P. 295.
(12) (1871) L. R. 6 Q. B. 276.
(13) (1886) 18 Q. B. D. 54.

Irelands' repudiation. The respondents had to find other employment for the ship, and lost heavily in doing so.

The appellants contend that the damages should be nominal, because the respondents within a day or two of the appellants' misrepresentation knew that there was no concluded contract, and that the respondents were no worse off than before. This is not so, for the loss of time in connection with Messrs. Irelands' contract made all the difference to the respondents with regard to the profitable employment of their ship. The respondents, therefore, submit that the judgment of the Court below was right.

Scott Dickson, K.C., in reply.

The House took time for consideration.

1905. April 14. EARL OF HALSBURY L.C. My Lords, the proposition of law laid down by the Exchequer Chamber in *Collen* v. *Wright* (1) must, I think, notwithstanding the protest made by Cockburn C.J., be held to be the law. But one must see what that proposition is, and how far it is applicable to the case before your Lordships. The proposition is this: that a person who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorized to act as such agent is answerable to the person who so contracts for any damage which he may sustain by reason of the assertion of authority being untrue. This is the authority upon which the Court below have given damages, but it really has no application to the facts in proof here.

A firm applies to a shipbroker in Scotland to obtain freights for a vessel of theirs. The shipbroker, in consequence, opens a negotiation with Messrs. Ireland, who state certain terms which they will accept, one of which is what the appellants' principals will not agree to. The appellants nevertheless untruly report that the bargain is complete, whereas the bargain, in fact, went off altogether. Now I quite agree that, if in consequence of their misstatement the respondents changed their position and suffered damage, the appellants

(1) 7 E. & B. 301; 8 E. & B. 647.

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would be liable for any actual damage arising from the acting on that erroneous statement, and it is no answer to say that the appellants bonâ fide expected to get over the one outstanding term by which the bargain went off; but it appears to me there is an absolute failure to make out any such damages as are claimed, though I think 33*l.* odd has been justly suggested as enough to cover all actual damage sustained, and for that the respondents ought to sustain their judgment.

Earl of Halsbury L.C.

But I think that the respondents in applying the doctrine of *Collen* v. *Wright* (1), and treating the appellants as having held themselves out as the agents of Messrs. Ireland, and clothed with their authority to make a contract, are seeking to get, and the Court below have given them as damages, the profits they would have made if Messrs. Ireland had in fact authorized the appellants to act as their agents, and had in truth made that bargain. But, in fact, they did nothing of the sort; they were endeavouring to get a bargain from Messrs. Ireland, and having failed to overcome Messrs. Ireland's objections, they are in the position of not having got the bargain they represented they had.

There is no evidence of any loss sustained by reason of relying on the untrue statement, and I think the original judgment cannot be supported.

I therefore move that the judgment be reduced to 33*l.* odd, and the appellants ought to get the costs of this appeal.

LORD DAVEY. My Lords, it is not necessary for the purpose of this decision to have recourse to the doctrine of *Collen* v. *Wright*. (1) The appellants, the shipbrokers, were undoubtedly agents of the respondents for the purpose of finding a charter for their ship. But I am not satisfied on the evidence that the appellants were employed by Messrs. Ireland & Son to find a ship for their requirements. It appears to me that the negotiations were carried on between the appellants as agents for the respondents with Irelands as principals acting on their own behalf. No doubt the appellants were intermediaries between the two firms, but that always is so where the agent of one

(1) 7 E. & B. 301; 8 E. & B. 647.

party is negotiating with the other party. Wherever a person misrepresents a fact relative to a third party, he, in a sense, impliedly represents that he is authorized to make the statement. But I do not think that he is thereby asserting that he is clothed with an authority or fills a particular character within the meaning of the doctrine of *Collen* v. *Wright* (1) as explained in subsequent cases, including the recent case of *Starkey* v. *Bank of England* (2) in this House, or that the doctrine ought to be extended to such a case as that now before your Lordships.

But the appellants were guilty of a breach of their duty to the respondents, their principals, in giving them incorrect information as to their business, and are liable in damages for such a breach of duty. The measure of damages in such a case has recently been discussed in the Court of Appeal in England in the case of *Cassaboglou* v. *Gibbs*. (3) It was there determined that the measure of damages was the loss actually sustained by the principal in consequence of the misrepresentation, and that it did not include the anticipated profit which he might have made if the representation had been true. I am of opinion that the proper measure of damages in the present case is the same as in the case I have referred to. There is no evidence that the respondents lost any opportunity of profitably employing their ship owing to their belief that a charter had been arranged with Ireland & Son, and I am of opinion that they cannot, therefore, recover anything in respect of the profits which they might have derived if their belief had been well founded. With regard to the expenses of the abortive action against Ireland & Son, the question is whether they were reasonably incurred. On this point the letters which passed between the respondents' solicitors and the appellants on February 27 and 28 and March 1 are important; and I think the respondents are entitled to recover these expenses subject to taxation. The only other head of damage claimed is a general charge for telegrams and trouble and inconvenience. I think the sum of 33*l.* 1*s.* 3*d.* which has been

(1) 7 E. & B. 301; 8 E. & B. 647.
(2) [1903] A. C. 114.
(3) 11 Q. B. D. 797.

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awarded by the Court below will be an ample compensation and solatium to the respondents on this head.

I am, therefore, of opinion that the interlocutor of the Lord Ordinary should be varied by the substitution of the sum of 33*l.* 1*s.* 3*d.* for the sum of 450*l.*, and quoad ultra it should be affirmed; and that the respondents should pay the costs of this appeal.

LORD ROBERTSON. My Lords, in the view which I take of it this case is one of great simplicity both in fact and in law.

A foreign shipowner (the respondents' firm) employs a Leith shipbroker (the appellants) on the usual terms of remuneration to find freight for a steamship. The appellants take the business in hand and report that they have concluded a bargain. In fact no bargain had been concluded; differences, which the appellants, too sanguine, had hoped to get rid of existed and proved invincible; and three days after the news of the bargain the respondents learned that the thing was off.

That the appellants, by making this misstatement, acted in violation of their duty as agents for the respondents admits of no doubt; and the respondents have a good claim of damages for whatever loss has been caused them. If, for example, acting on the faith of the alleged contract, the respondents had incurred expense, or if, misled into inaction, they had missed other chances for the ship, these and the like would be heads of damage.

The facts in the present case are not of this kind. The respondents, in furtherance of their theory of their case, have been at pains to prove that at this particular time no other advantageous freights were to be had, and, when informed that the bargain was off, they made no efforts to look for them. They found employment for the steamer in a quarter where it was easily to be had (under a current contract) although at a low rate, 5*s.* per ton.

The claim of the respondents is for the difference between this rate and 7*s.* 6*d.* per ton, the rate in the bargain which was not concluded; and their theory is that they are entitled to

take the appellants at their word, and demand from them fulfilment of the charter or damages. To this the short answer is that the appellants (who dealt with Irelands at arm's length) did not in point of fact assume to act for the alleged charterers at all, and they purported to report the agreement of the charterers as matter of fact. The central and crucial fact in the case is that the appellants did not represent to the respondents that they acted for Irelands. The case is, therefore, not within the scope of *Collen* v. *Wright*. (1)

The practical result is that in my opinion the main part of the claim of damages is untenable. But I think that the respondents are entitled to something for certain damage which they have proved, to wit, trouble, outlays on telegrams, and the like; and in the Court of Session this has been fixed at 33*l*. 1*s*. 3*d*. They have been also held entitled to the expenses incurred by them in the action against Messrs. Irelands down to the closing of the record, and I think that they are entitled to this; but this limitation of those expenses to the period before closing the record is not specified in the interlocutor of the Lord Ordinary, although it is in his judgment, and it should perhaps, therefore, be now declared.

Ordered and adjudged, that the said interlocutor of the 16*th day of January*, 1903, *complained of, and the said interlocutor of the Lord Ordinary of the* 16*th day of April*, 1902, *also complained of in the said appeal, be, and the same are hereby, varied by striking out the figures "*450*l*." *and inserting in lieu thereof the figures "*33*l*. 1*s*. 3*d*.," *and by adding after the word "record" occurring in the said interlocutor of the* 16*th day of April*, 1902, *the words "but down to the closing of the record, in that action, only," and that, subject to the said variation, the said interlocutors be, and the same are hereby, affirmed: Further ordered, that the said cause be*

(1) 7 E. & B. 301; 8 E. & B. 647.

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remitted back to the Court of Session in Scotland, with a direction to do therein as shall be just and consistent with this judgment and variation: And it is further ordered, that the respondents do pay, or cause to be paid, to the said appellants the costs incurred in respect of the said appeal to this House.

Lords' Journals, April 14, 1905.

Agents for appellants: *Botterell & Roche, for Beveridge, Sutherland & Smith, S.S.C., Leith.*

Agents for respondents: *Hollams, Sons, Coward & Hawksley, for J. & J. Ross, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (D.)
1905
May 9.

MALONE'S DIVORCE (VALID ACTION) BILL.

Ireland—Divorce—Decree Nisi under the English Divorce Acts—Doubt as to Operation in Ireland—Domicil.

Where there are doubts as to the operation in Ireland of a decree under the English Divorce Acts for the dissolution of the marriage of a domiciled Irishman, the proper course is to apply for an Act of Parliament confirming the decree and removing doubts.

BILL to remove doubts as to the validity of a decree dated November 22, 1892, of the Probate, Divorce, and Admiralty Division in England dissolving the marriage solemnized on July 11, 1872, between the petitioner John Richard Malone of Westmeath, Ireland, with the respondent the Hon. Charlotte Mildred Yarde-Buller, his wife, and to confirm the said decree. The petitioner has always been a domiciled Irishman. Before her marriage the respondent was domiciled in England, and the marriage was solemnized in England. The parties lived in Ireland and also in England. There were three children of the marriage. In 1890 the petitioner, then living at 35, Duke Street, St. James's, London, filed a petition for divorce, charging the respondent with having committed adultery with

one Count Charles de Beaumont D'Autichan. The suit was undefended, and the English Court granted the said decree nisi of 1892. The respondent and co-respondent had since married, and resided chiefly in France. After the decree nisi had been made absolute the petitioner married in England in 1893 Catherine Cecil Percy, and there were three children of this second marriage.

Prior to and in contemplation of the second marriage, the petitioner and his father by indenture appointed to the said Catherine Cecil Percy, in case the said marriage took place and she should survive the petitioner, a yearly rent-charge of 500*l.* by way of jointure, and charged the same upon certain estates in Ireland. There were no divorce proceedings in Ireland. The petitioner had recently been informed that doubts existed as to the validity in Ireland of the decree nisi of November 22, 1892, and he thereupon presented a bill in Parliament for a divorce. When the bill came before the House on March 30, the Earl of Halsbury L.C. suggested that the proper course was not to present a bill of divorce, but a bill to confirm the decree of the English Court. His Lordship said: "This is not really a divorce bill; it is a bill to remove doubts. Therefore there need be no evidence taken in this House to prove the adultery already proved in the English Court. The bill must be recast at once."

The House gave leave to present in lieu of the divorce bill a bill for the purpose of confirming the decree of the High Court of Justice (Probate and Admiralty Division) in England, and removing doubts.

Hence this new bill. On April 3 the House allowed substituted service on the respondent's solicitors, and on the respondent in Paris under her maiden name of Mrs. M. Buller, 4, Rue de Sèze, Paris, as she had no permanent address.

SECOND READING.

May 9. *W. Samuels, K.C.* (*H. Mecredy* with him), (both of the Irish Bar), for the petitioner. To establish the necessity for this bill and for the intervention of the House it is enough to shew that there is a doubt whether the decree nisi of the

H. L. (D.) 1905 MALONE'S DIVORCE (VALID ACTION) BILL.

English Court is of force in Ireland. There is ground for this doubt: see *Sinclair's Divorce Bill* (1), Lord Watson in *Le Mesurier* v. *Le Mesurier* (2), and *Armytage* v. *Armytage*. (3) When the English Court made this decree it considered it had authority in the case of *Niboyet* v. *Niboyet* (4), but doubts were thrown on that case in *Harvey* v. *Farnie* (5) and *Roberts* v. *Brennan*. (6) [He also commented on the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 27.]

EARL OF HALSBURY L.C. In the opinion of their Lordships, it has been sufficiently established that the question of the validity of the English decree is at least arguable, and that in the circumstances justice would be done by passing this bill—proceeding on the footing that it was a doubtful matter, and not treating it as a decision on a point of law.

THE HOUSE (Earl of Halsbury L.C., and Lords Macnaghten, Davey, James of Hereford, and Robertson) allowed the bill to proceed for second reading.

Vesey Knox, for the respondent. The respondent is not a party to these proceedings to the extent of admitting that there is any doubt as to the operation of the decree of the English Court or that it needed confirmation. [He cited *Zycklinski* v. *Zycklinski*. (7)]

EARL OF HALSBURY L.C. You have made your point that you are not to be taken to acquiesce in these doubts.

The Bill was read a Second time.

Lords' Journals, May 9, 1905.

Agents for petitioner: *Batten, Proffitt & Scott, for T. T. Mecredy & Son, Dublin.*

Agents for respondent: *Payne, Shaw-Mackenzie & Lake.*

(1) [1897] A. C. 469.
(2) [1895] A. C. 517, 527, 531.
(3) [1898] P. 178.
(4) (1878) 4 P. D. 1.
(5) (1882) 8 App. Cas. 43.
(6) [1902] P. 143, 144.
(7) (1862) 2 Sw. & Tr. 420.

[HOUSE OF LORDS.]

WATT AND OTHERS . . . . . APPELLANTS;

AND

ASSETS COMPANY, LIMITED. . . . RESPONDENTS.

BAIN AND OTHERS . . . . . APPELLANTS;

AND

ASSETS COMPANY, LIMITED. . . . RESPONDENTS.

H. L. (Sc.)

1905

June 5.

Company—Discharge of Contributory on Composition—Reduction of Discharge after Twenty Years on Allegation of Concealment of Assets—Lapse of Time.

Where a company is wound up and contributories are discharged from further liability on a composition and a period of twenty years supervenes, every intendment must be made in favour of what was done twenty years before as having been lawfully and properly done.

In 1882 the Assets Company under a private Act of Parliament took over the whole assets and rights of the City of Glasgow Bank, which had gone into liquidation in 1878.

In 1901 and 1902 the Assets Company brought actions against trustees and beneficiaries of two contributories who had in 1879 been discharged of their liabilities to the bank on compromises with the liquidator, asking for a reduction of the compromises on the ground that the contributories in negotiating with the liquidator concealed or failed to disclose a portion of their property :—

Held, reversing the decision of a majority of the Second Division of the Court of Session, with the assistance of three judges of the First Division, that, having regard to the circumstances of the case coupled with the delay, no concealment or untrue statement of assets had been proved or could at this distance of time be assumed.

APPEALS from judgments of the Second Division of the Court of Session, Scotland (1), with the assistance of three judges of the First Division.

These appeals arose out of the liquidation of the City of Glasgow Bank, which commenced on October 22, and was placed under the supervision of the Court on November 27, 1878.

In Watt's appeal the appellants were the acting trustees and executors and beneficiaries, so far as known, under the trust

(1) (1904) 6 F. 754, 692.

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disposition and settlement of the late Alexander Phillips, who died on February 6, 1881.

The respondents were the Assets Company, who were originally the solvent shareholders of the City of Glasgow Bank, who formed themselves into a company, and to whom were transferred and sold for a money payment the remaining assets of the bank to enable the liquidation to be brought to an end, and assets to be (what is called) "nursed" and realized at a greater advantage than could be effected by an immediate sale. Their title was confirmed by a private Act, the City of Glasgow Bank (Liquidation) Act, 1882 (45 & 46 Vict. c. clii.).

The respondents in the action sought—(1.) to reduce an interlocutor of the First Division of the Court of Session dated June 10, 1879, which sanctioned the liquidators of the City of Glasgow Bank carrying out (inter alia) a compromise with Alexander Phillips, a contributory, and for discharging him of his obligations to the bank and its liquidators; (2.) the agreement of discharge between Alexander Phillips and the said liquidators; (3.) for an account by the appellants, Phillips' trustees, of their intromissions with his estate, and for payment of the alleged amount due by Phillips in respect of calls on shares held by him in the bank at the date of its liquidation. The ground upon which the reduction was sought was that Alexander Phillips did not make, as he was bound to do, a full and complete disclosure of the assets possessed by him at the date of his discharge. The appellants stated a preliminary plea that the respondents had no title to sue; but on July 11, 1902, the Lord Ordinary allowed parties a proof, and on January 13 the Second Division disallowed the plea of no title to sue, and allowed the respondents a proof of the alleged concealment of shares in the Scotia Shipping Company, Limited, and also of concealment of heritable property belonging to the late Alexander Phillips. No question of the title to sue was insisted on in this House; and the question of the heritable property was hardly entered into. The main question was as to the alleged concealment of the shares in the Scotia Shipping Company. These shares did not appear in Alexander Phillips' statement of assets made to the liquidator in 1879; but the

appellants contended that they were worthless in 1879, and were probably disclosed to the late Mr. Cameron, one of the liquidators of the bank who resided in Glasgow and with whom Mr. Phillips made the compromise. Mr. Cameron was dead, and in fact all the liquidators were dead except a Mr. Haldane.

As the judgment of the Lord Ordinary (Lord Kyllachy), affirmed by this House and printed at the end of this report, gives the facts in respect to these shipping shares, it is not considered necessary to repeat these facts here.

On June 13, 1903, the Lord Ordinary assoilzied the appellants from the conclusion of the summons. Against this judgment the respondents appealed to the Second Division. After the case had been heard it was reargued before the judges of the Second Division, assisted by the Lord President (Lord Kinross) and Lords Adam and Kinnear of the First Division. On March 18, 1904, the Court, by a majority (Lords Young and Moncreiff dissenting) recalled the Lord Ordinary's interlocutor, and gave a decision in favour of the reductive conclusions of the summons.

In the Bain appeal, which was heard first in the Court of Session, the only point of difference was that the appellants' trustees had long since paid over the whole estate in their hands to the beneficiaries and been discharged from their office.

The respondents were, as in the previous case, the Assets Company, and they brought this action in 1901 against the respondents William Bain and others, the surviving testamentary trustee of William Bain, some time manager of the City of Glasgow Bank, and certain of the beneficiaries under the deceased Mr. Bain's trust disposition and settlement for any interest they might have. The late Mr. Bain was a contributory to the bank, and the summons concluded for reduction of (1.) an interlocutor of March 18, 1879, whereby the First Division sanctioned a compromise carried out by the liquidator of the bank with Mr. Bain, and (2.) an agreement and discharge dated April 30, 1879, executed in pursuance of that interlocutor. There was, further, a conclusion against the appellants as trustees aforesaid for payment of 63,787*l.* 13*s.* 4*d.*,

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reserving always to the pursuers all claims competent to them against any other person liable to them. Mr. Bain died in November, 1882, leaving a trust disposition and settlement, and his trustees, of whom the appellants first called were survivors, were discharged by the beneficiaries on fulfilment of the trust purposes in 1888.

The discharge granted by the liquidators of the bank in favour of Mr. Bain was preceded by the following statement (this statement and declaration also appeared in Phillips' discharge): "Whereas the first party is a partner of the said bank, and as such has been placed upon the list of contributories thereof as a holder of 1200*l.* of the capital stock thereof, and whereas the said liquidators have made calls upon the contributories of the said bank in order to provide funds for the payment of the debts thereof, and the first party has represented to the said liquidators that he is unable to meet the demands so made upon him to any greater extent than has already been paid or secured to the said liquidator, and the first party has made and verified by a solemn declaration and delivered to the said liquidators, in answer to certain printed queries which they addressed to him, a written statement of his affairs, means, and property in possession or expectancy, and has agreed to grant to them the assignment under written, and whereas on the basis and on condition of the truth, accuracy, and completeness of the said statement of his affairs, means, and property the said liquidators intimated their readiness to agree to accept the payments or securities which have already been made or secured to them by or on behalf of the first party as a compromise of the claims against him as a partner of the said bank, and to execute a discharge in his favour accordingly." And then the document mentioned the sanction of the Court.

The solemn declaration made by Mr. Bain was as follows: "I, William Bain, late manager City of Glasgow Bank, Edinburgh, do solemnly and sincerely declare that the several matters and things mentioned and contained in the answers written on the preceding page are true and correct answers to the printed queries prefixed thereto to the best of my knowledge and belief."

The declaration was appended to a form which was required to be filled up by contributories unable to meet the calls :—

"Answers and declaration by the late William Bain.

"Excerpt from minute of liquidators of the City of Glasgow Bank, of date 18th November, 1878.

"3rd. That any discharge to be granted shall proceed on the truth of the declaration emitted by the applicant, any untrue statement made therein being held to invalidate the discharge. . . . .

"City of Glasgow Bank Liquidation.

"Mr. William Bain.

"Call of 500*l.* per 100*l.* of stock on 1200*l.* stock made on 13th November, 1878. . . . .

"II. What property do you possess, and what is its nature and value to the best of your knowledge and belief? (Specify the particulars, if necessary, in the separate signed list or schedule marked A, and accompany the statement with valuations, certified rentals, and other evidence of value by competent parties.)

"*Ans.* (No property.) Certificates of stocks held. See Schedule A. . . . .

"IV. What is your regular or average annual income, and from what sources is it derived? (Specify the particulars, if necessary, in the separate signed list or schedule marked B.)

"*Ans.* 1200*l.*, as manager of City of Glasgow Bank, Edinburgh. . . . .

"VI. Have you any expectation of funds or property of any kind coming to you by succession or otherwise? If so, state its nature and probable value.

"*Ans.* None.

"VII. Have you, since 1st October, 1878, paid any debts previously due by you, and have you paid any debts contracted, or for which bills or other vouchers have been granted by you since 1st October, 1878? If so, state the particulars of such debts and payments.

"*Ans.* Have paid tradesmen's accounts, amounting to 321*l.* 19*s.* 3*d.* . . . .

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"IX. What sum or other consideration do you offer for a discharge in full of all claims by the liquidators against you as a shareholder of the City of Glasgow Bank; and in what manner do you propose it shall be secured or paid? Or, in view of continuing liable as a partner, what sum do you offer to pay to account; and in what manner and at what terms do you propose that it shall be secured or paid?

"*Ans.* To hand over the certificates of stocks held, my life policy, valuation of furniture, and the cash in my possession, and a cheque for the balance at my credit in City of Glasgow Bank, amount 235*l.*

"W. Bain,
"21st December, 1878.

"Schedule A.

	£	s.	d.
"175 shares in Standard Investment Company, selling at this date at 2*l.* 6*s.* per share . .	402	10	0
50 shares of the Imperial Credit Coy., Ltd., surplus certificates, price paid . . .	340	0	0
			W. Bain.
Edinburgh, 5th Nov. 1878.			
Accounts paid	161	19	3
Tradesmen's books, such as bakers, butchers, &c., and money given for current expenses, say .	160	0	0
	321	19	3

Statement of Mr. William Bain's effects at this date.

	£	s.	d.
175 shares in Standard Investment Coy., at 2*l.* 6*s.* per share	402	10	0
50 shares The Imperial Credit Coy., Limited, surplus certificates	340	0	0
Furniture, *p.* valuation	168	13	0
Life policy, surrender value	709	10	0
Cash at credit of a/c. in bank	235	0	0
Cash to be paid down	600	0	0
	2455	13	0

Edinburgh, 5th November, 1878."

Then followed the declaration given above. The 600*l.* to be paid down was the balance remaining in Mr. Bain's hands of 1000*l.* withdrawn by him from his current account with the bank the day before the doors were closed.

The respondents averred that, as appeared from an inventory of Mr. Bain's estate lodged by his trustees in 1883, he was at the date of the liquidation of the bank in possession of two promissory notes for 300*l.* and 200*l.* respectively, granted by his sons James and William Bain, and that he fraudulently omitted these promissory notes from the statement of his means and effects. They also alleged that he had concealed a reversionary interest belonging to his wife in the estate of a Mr. Potter, which they alleged had vested in him de jure mariti. This reversionary interest was included in the inventory of Mrs. Bain, who died in 1888.

The promissory note by James Bain to William Bain was dated January 1, 1874; it was as follows:—

"Promissory note for £500, by James Bain to William Bain, dated 1st January, 1874, with jottings thereon in pencil. Interest at 5 per cent., to be paid half-yearly [Pencil].

£500. London, 1st January 1874.

Stamp 5*s.*

On demand I promise to pay Mr. William Bain, manager, City of Glasgow Bank, Edinburgh, or his order, Five hundred pounds stg., for value received.

James Bain.

This bill granted for £500 advanced to James Bain, and put into the firm of And. Lusk & Co., on his getting a share in that business [Pencil].

(*Marked on back thus.*)

Half-year's interest to 1st July, 1874, paid. W. B.
Half-year's interest paid to 1st Jany. 1875. W. B. Interest 1875
,, June 30. Half-year's ∧ to 1st July, ∧ £12 10*s.*, paid to date. W. B.
,, Decr. 27. Half-year's interest, £12 10*s*, paid to date. W. B.

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1876.
29 June. Half-year's interest, £12, 10*s*., paid to date. W. B.
1876.
Decr. 27. Half-year's interest paid to date. W. B.
1877.
July 28. Half-year's interest paid to date. W. B.
1878.
Jany. 7. ,, ,, ,, W. B.
June 25. ,, ,, ,, W. B.
1879.
Jany. ,, ,, ,, W. B.
April. Received payment of Two hundred pounds in part payment. W. B.
July 3. Half-year's interest date. W. B.
1880.
Jany. Half-year's interest on £300 received. W. B.
July. ,, ,, ,, W. B.
1881.
Jany. 12. ,, ,, ,, W. B.
July 1. ,, ,, ,, W. B.
1882.
Jany. 2. ,, ,, ,, W. B.
1883. January 15th. Received payment of Three hundred and seven pounds 10*s*., by which sum this bill is discharged. Wm. Bain.
For Trustees of late W. Bain."

The reversionary interest in Mr. Potter's estate was very remote, owing to there being annuitants before Mrs. Bain's interest could fall in. Not much stress was laid on it at the bar by the respondents, the chief point argued being the value of the promissory notes by the two sons. The two sons stated that they considered the sums their father gave them were simply advances to account of patrimony, although the notes were found tied up with Mr. Bain's will. The appellants alleged that there was a presumption that these promissory notes were mentioned in a personal interview with the liquidator, and that was the reason the cash payment of 600*l*. promised by Bain was increased to 1000*l*. Mr. Haldane, the

sole surviving liquidator, on this point said he had found no trace of the two promissory notes in any of his books; but he went on to say possibly, if he thought they were of no value, he could not say whether he would have made any entry or not, and he could not swear they were not disclosed. There was also a letter dated March 6, 1879, shewing that there had been a conversation between Mr. Bain and Mr. G. Auldjo Jamieson in respect to paying 1000*l.* in cash instead of 600*l.* Further facts are given in the judgment of the Lord Ordinary (Lord Kyllachy) (1), who was in favour of the appellants on all points. On a reclaiming note, the Second Division being equally divided, the case was reargued before the Second Division, and three (see above, p. 319) judges of First Division. On March 18, 1904, their Lordships delivered the opinion of the majority, being in favour of the respondents (Lord Young and Lord Moncreiff dissenting). On May 28, 1904, the Second Division, carrying out the opinion of the majority of the Court, passed an interlocutor recalling the Lord Ordinary's interlocutor, and reducing, decerning, and declaring in terms of the reductive conclusions of the summons, and finding the appellants jointly and severally liable to the respondents in costs, and remitting to the Lord Ordinary to proceed with the case.

WATT'S APPEAL.

May 29, 30; June 2. *Haldane, K.C.* (with him *Ure, K.C.*, and *William Hunter*), (all of the Scottish Bar except the first), for the appellants. The broad question here is whether there was concealment of assets in the nature of fraud. Fraud is a question of fact. The evidence proves that at the date of the liquidation of the bank the shipping shares were worthless; Mr. Phillips paid the first call made by the bank liquidators, and on the second call being made he had an interview with the liquidators, and there was a compromise which was sanctioned by the Court. There was a debt of twelve or thirteen millions to general creditors, and it was absolutely necessary to get money in rapidly, so that many compromises

(1) See post, at p. 336.

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were arranged. After Phillips obtained his discharge he went on with his business of wholesale grocer, and died worth about 7000*l.* His inventory of what he left was open to any one to see. The Assets Company was formed in 1882, and immediately after that date they brought an action in the Court of Session to obtain the custody of all the papers in the City of Glasgow Bank liquidation, and they succeeded: *Liquidators of the City of Glasgow Bank* v. *Assets Co.* (1) It was there observed that nothing short of a case of fraud would induce the Court to open up discharges in favour of insolvent contributories granted in a company wound up under supervision of the Court. The Assets Company slept on these papers, and it was not until the year 1902 that this action was raised, with many others, to make a systematic and scientific overhaul of all the compromises. But at this distance of time, when nearly every one who could assist in the matter is dead, it is too late to rip up this compromise: *Clippens Oil Co.* v. *Edinburgh District Water Trustees.* (2) This claim involves a charge of fraud or nothing. Turning to the evidence, it proves that these shipping shares were utterly unsaleable in 1879, and it must be presumed that the liquidator saw that was so. All that a contributory is required to do, in terms of the printed documents, is to make an honest statement. Even if the contributory's statement was inaccurate, that would not be sufficient to upset the compromise. Further, a right to bring this action did not pass to the respondents under the private Act of 1882.

[He was stopped, the EARL OF HALSBURY L.C. saying he did not see any proof of fraud.]

J. Avon Clyde, K.C. (with him *J. S. Leadbetter* and *F. C. Thomson*), (all of the Scottish Bar), for the respondents. The duty of the liquidator was to sequestrate the assets of Phillips. If he had done so he would have received a universal title to the whole estate of the bankrupt; but to avoid the stigma of bankruptcy the liquidators said, "If you surrender all you possess we will give you a discharge"; but this discharge was to be conditional on a complete disclosure.

(1) (1883) 10 R. 676. (2) [1904] A. C. 64.

[THE EARL OF HALSBURY L.C. called attention to what Lord President Inglis said in *Liquidators of the City of Glasgow Bank* v. *The Assets Co.* (1): "It is a discharge which is conditional on the truth of the statement made by the contributory to the liquidators regarding his estate—that is to say, if any part of the statement is designedly false and intentionally misrepresents the state of the contributory's affairs, then the whole discharge is bad."]

That observation was not necessary to the case. Lord Inglis was there dealing with the right to the custody of documents only. There is no evidence of any oral disclosure. If there had been a verbal arrangement, the duty was cast on the contributory to preserve evidence of it. Even if the shares were valueless, his omission to make a full disclosure of them would vitiate the discharge. Here Phillips lived only eighteen months after his discharge and left 7000*l.*, although he was supposed to have surrendered all his property. Secondly, these shares cannot be said, on the evidence, to have had no realizable or prospective realizable value, nor can it be said that Phillips had no knowledge, for he took a personal interest in the shipping company. It is contended that neither the lapse of twenty nor thirty years can do away with the effect of non-disclosure.

Non-disclosure with knowledge is fraud; after a much longer period than in the present instance fraud was held to be proved: *Charter* v. *Trevelyan.* (2) The Assets Company was formed out of the solvent contributories. The liquidators wanted one million and a quarter to pay off outstanding debts, and the Assets Company handed them that sum for all the remaining assets. In 1882 no one thought of fraud; but in 1889 by an accident a discovery was made respecting a compromise. A claim was made and a very considerable sum was recovered, and seven or eight actions followed and a further sum of 70,000*l.* recovered. After that the list of 1100 contributories was gone through, and it so happened that Phillips' and Bain's inventories were amongst those gone into last. That accounts for the delay.

(1) 10 R. 676. (2) (1844) 11 Cl. & F. 714; 65 R. R. 305.

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BAIN'S APPEAL.

June 2, 5. The same counsel appeared for appellants and respondents, except that *John H. Tait* took the place of *W. Hunter* for the appellants.

Haldane, K.C. If Mr. Bain had been made a bankrupt the liquidator could not have got anything out of Potter's estate. The Court would first have made a settlement on Mrs. Bain under the Conjugal Rights (Scotland) Act of 1861 (24 & 25 Vict. c. 86). As to the promissory notes, the liquidator made Mr. Bain pay 400*l.* cash more than he first offered, and then came interviews with Mr. Jamieson. It is quite possible Mr. Bain spoke to Mr. Jamieson about the notes, and 400*l.* extra was taken for their value; 200*l.* of this one of the sons paid, and Mr. Haldane, the sole surviving liquidator, says in his evidence that he could not swear they were not mentioned. On this it is contended that there is no case. As to the trustees, they wound up the estate and obtained their discharge in 1888. In Scotland that is a good discharge for all time.

J. Avon Clyde, K.C., for the respondents. The fair inference is that the liquidators were not informed of the existence of the promissory notes. No memorandum of them appears in the liquidators' books, nor did they inform the Court of them. It is not disputed that these notes had a realizable value. Payment of interest from son to father was made until the latter's death, and as between father and son they were regarded as an enforceable debt. It followed that it must be assumed there was non-disclosure and conscientious omission.

EARL OF HALSBURY L.C. My Lords, these appeals arise on two independent cases, but I think they are open to the same observations, and although they may in some comparatively immaterial particulars differ from each other, the substance of the matter to be discussed is a matter which is common to both. I confess I am of opinion that these appeals ought to succeed.

My Lords, I agree with the learned Lord Ordinary, and to some extent with Lord Kinnear also, although in the result he differed, and with the other learned judge who gave judgment

in favour of the appellants. It appears to me that the matter rests, not upon any question of technical law, but upon broad common sense, and especially upon these two principles—that at this distance of time every intendment should be made in favour of what has been done as being lawfully and properly done, and that the persons who are now insisting upon these rights have lain asleep upon their rights so long that as a matter of fact we know that witnesses have perished, and the opportunities which might have been had if the question had been earlier raised have passed away. We are asked at a distance, in the one case of twenty years, and in the other case of twenty-two years, to rip up a transaction which had apparently been completely disposed of.

My Lords, the question arises in this way: Those who are appearing as litigants in this case, the pursuers, are asking to have undone a release, a compromise, which has now been in existence for twenty years; and they ask it upon grounds which seem to me to be unsound for more reasons than one. In the first place, I wish to say that I do not concur with the view which has found favour with some of the learned judges below, that this compromise, and the release which has been executed in pursuance of that compromise, must be so construed that nothing but that which is contained in the written document itself can be applied to as explaining or affecting the legal effect of the document. If I understand the argument rightly, it comes to this: You have in this document made it part of your bargain that you shall disclose all your effects. I want to introduce into that, as part of the legal effect of the instrument, not only that you must disclose, but that you must disclose *in writing*, and in *this* writing all your effects. The questions have been propounded for the purpose of getting written answers to those questions. The questions are intended to ransack your whole estate; and if you do not disclose all your estate, nay, further, if you do not disclose it by written answers to these written interrogatories, it must be part of the condition of this release that the release thereupon becomes void. My Lords, it seems to me that that is an unsound view of this document for more reasons than one, particularly for the

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reason which one of the learned judges points out, that the statement on which the release is granted is made to the best knowledge and belief of the person executing the document that such is the state of his affairs. Unless something much more definite were placed in the document to make the accuracy of the statement therein a part of the contract, as is done in some policies of insurance, so that any inaccuracy should avoid the instrument executed, I decline to put into that document either by express words or by implication something which is not there. The statement appears to be made according to the knowledge and belief of the person who is making the declaration, and therefore, if according to the belief of the person who made it this was the true and accurate state of affairs, even though it should turn out to be inaccurate, I construe that document as making it a perfectly good release notwithstanding an inaccuracy, an unintentional and non-fraudulent inaccuracy, which afterwards might be discovered in it.

Therefore, my Lords, I differ entirely from the view that the disclosure must either be in writing or must be in the particular document in writing. If a disclosure was made at the time to those who were entitled to put the questions and take the answers, even though it was made verbally, I am of opinion that that would be enough to make the release a perfectly good release.

My Lords, with regard to Lord President Inglis' judgment (1), it was said that his observations were obiter. I am not quite certain that I concur in that view, though I notice one of the learned counsel said he submitted it was obiter. When a learned judge is giving his views why this or that does not come within the meaning of the law which makes a thing inoperative, and when he distinguishes the case before him by pointing out that there was no fraud, and, therefore, the fraud imputed did not exist, I very much doubt whether that is one of those things which can be described as a mere obiter dictum. It is part of the law which is guiding his judgment, and part of the law he is bound to expound in the

(1) See *Liquidators of the City of Glasgow Bank* v. *Assets Co.*, 10 R. 676, at p. 678.

judgment he is pronouncing. So far, therefore, I am bound to say that the two propositions of law which appear to have supported the judgment of the Court below I am unable to concur in; on the contrary, I wish to express my entire dissent.

With regard to the facts upon which the question then turns, I do not think any very elaborate exposition is required. There are two things which are indicated here as points upon which disclosure was withheld: in the one case certain shares, and in the other case two promissory notes are alleged, and must, in order to make the case insisted upon by the pursuers, be alleged to have been withheld, and in truth a false statement made in respect to them.

With regard to the question of the shares, to my mind, assuming I am right in the view I have taken that a verbal statement is sufficient, it only requires to be stated in a very few simple sentences to point out how extremely unreasonable at all events is the suggestion that the mere non-statement of these shares ought of itself, at this distance of time, to set aside the release. A number of shares undoubtedly existed. If they were valueless, I should have thought it was not at all an unlikely thing to happen (I am speaking now of ordinary inferences of fact from the facts in proof rather than any presumption of law one way or the other), that those who were charged with the administration of the affairs of the Glasgow Bank on its insolvency would have been very shy of taking up these absolutely useless shares and incumbering their statement of affairs with them. And what were these shares? These shares were shares of a shipping company which from its commencement had made losses, whose ships, according to the evidence, were unfitted for the services for which they were intended, and as to which there was no reasonable expectation that they would make a commercial success. To my mind it was not an unreasonable suggestion that these shares were not considered of any value, and were not put down in the list. It is said, "But at all events these were shares that might become of value." I do not think anybody believed that they would become of value.

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Therefore, at all events at this distance of time, I am not going to assume that they were thought to be of value at a time when I should think nobody supposed they were of value.

Then it is said that they were kept back—that he "kept them dark": I think that was the phrase used by one of the learned counsel. I do not understand quite what that referred to. If this gentleman, who was equally with the other a person of character and position, had intended to keep back the existence of those shares as part of his assets, there are very familiar modes by which he could have done that without exposing himself to risk. When he was getting together a good deal of money, both from friends and others and himself, and buying his discharge, as it were, from the liability, he might have adopted various devices—one is so familiar with this sort of device that it becomes hardly necessary to state it—he might have conveyed every one of these shares to somebody or another who would have no responsibility, and have had a secret trust if he had any thought of their being of value. Instead of that, from the time he makes this statement until the time of his death, eighteen months afterwards, the shares are allowed to remain in his own name, capable of being ascertained, and capable of being known to be his; and yet I am to assume that he was either fraudulent, or at all events endeavouring not to do what he had agreed to do—namely, to give up his whole estate notwithstanding the effort that he was making to free himself from liability. If he was fraudulent, is it conceivable that he would have allowed this to remain after him as a perpetual drag upon whatever he did leave behind him, and so give the opportunity of detection and of avoiding the effect of what he was doing?

Then it is said, and said with great force, But he died eighteen months afterwards, and then facts were exhibited which could not be concealed and must be known as to the state of his affairs. He left behind him a considerable sum—that is, considerable having regard to what he had been doing, that is to say, making a compromise. Then why was not that at once made the subject of inquiry after his death within

eighteen months of his compromise? My Lords, I think it is not necessary for me to pursue this line of observation. One of the learned judges, I think, has not exaggerated the state of facts when he points out the number of deaths that have intervened, and the impossibility at this distance of time of disentangling what could have been very easily disentangled and ascertained if an earlier investigation had taken place.

My Lords, I do not propose to differentiate Watt's appeal from the case of Mr. Bain, although to some extent there is a difference between them. All I shall say about either of them is that at this distance of time I shall make every intendment in favour of that having been honestly done which purported to be done. I think I should expect some evidence to be produced contradicting that state of things rather than insist on evidence in its support at this distance of time, and with the loss of evidence that undoubtedly has occurred from the delay that has taken place. I should be content to rest my judgment on the language of the Lord Ordinary himself, in which, on both occasions, he has pointed out, I think with great force and accuracy, the result that ought to follow from the absence of evidence which has been the fault of those who are the pursuers here—that is to say, they have lain by upon their supposed rights all this time, during which time witnesses have died and the means of explanation have disappeared also to an extent which, to my mind, renders it impossible, or at all events extremely inexpedient as a matter of law and administration, to allow these things to be ripped up at this distance of time, when both the opportunities of explanation have gone by and when witnesses have passed away.

Under these circumstances I move your Lordships that both these appeals be allowed; that the judgment of the Lord Ordinary be restored; and that the respondents do pay to the appellants the costs both here and below.

LORD MACNAGHTEN. My Lords, I concur. I think the judgment of the Lord Ordinary is perfectly sound, and I think it ought to be restored.

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LORD DAVEY. My Lords, I also agree.

The case has been so copiously considered in the Court of Session in the numerous judgments, to which I have given my best attention, that I think I should not be justified in saying more than that I agree with Lord Kyllachy, Lord Young, and Lord Moncreiff.

I only wish to add this, that in coming to this conclusion I am not treating mora or delay as a plea in law. I do not think it is a plea in law; but I think the lapse of time is a circumstance which ought to be taken into account and ought largely to influence our estimate of and the conclusion we come to upon the facts of the case.

LORD JAMES. My Lords, I also concur.

LORD ROBERTSON. My Lords, I entirely agree in the general principles stated by the Lord Chancellor as applicable to an action of this nature, brought after this lapse of time. For a more detailed examination of the facts of the case I would refer to the judgment of Lord Kyllachy in each case, entirely concurring as I do with all that his Lordship has said.

In the case of Watt and Others, Ordered that the interlocutor appealed from be reversed, that the interlocutor of Lord Kyllachy of June 13, 1903, *be restored, and that the respondents do pay to the appellants the costs both here and below.*

In Bain's appeal, the same order.

Lords' Journals, June 5, 1905.

Agents for appellants in Watt's appeal: *Renshaw, Kekewich & Smith, for J. & J. Ross, W.S., Edinburgh.*

Agent for respondents: *Arthur E. Baker, for J. & D. Smith Clark, W.S., Edinburgh.*

Agents for appellants in Bain's appeal: *Faithfull & Owen, for J. & J. Galletly, S.S.C., Edinburgh, and Davidson & Syme, W.S., Edinburgh.*

Agent for respondents: Same as above.

NOTE.

WATT'S APPEAL.

Opinion delivered by LORD KYLLACHY (Ordinary) on 13th June, 1903.

In this case of Phillips the general features are not dissimilar to those of the case of Bain (see post, at p. 336) which I have just decided. But there is no question here as to the continuance of the defenders' trust; and although the delay in bringing the action has been equally great, and, I think, equally unjustifiable, I doubt whether it can be said, at all events as the facts have come out, that the delay has caused—at least, in the same degree—the prejudice to the defenders' position which it caused in the case of Bain. For there is here no question such as the question of the promissory notes in the case of Bain. The question here more closely resembles the other question in Bain's case, namely, the question as to Mrs. Bain's interest in Mr. Potter's succession; and here, as with respect to that question, I have found enough for the decision without having to face difficulties arising out of the death of the shareholder, and the deaths of all but one of the liquidators.

The discharge in favour of Mr. Phillips is sought to be set aside in respect of two alleged concealments in his state of affairs. The assets said to have been concealed are: (1.) 1359 shares of a shipping company, called the Scotia Company; and (2.) certain heritable properties, not identified upon record, but said at the original discussion to be situated in Rutherglen Road, Glasgow. It was to these two matters that the recent proof was confined—the Court being, as I understand, of opinion that no proof should be allowed of the random general statement introduced into this case, as into others, to the effect that, in addition to the assets specified, Mr. Phillips had concealed further assets not specified, of a value said by the pursuers to be not less than 14,000*l*.

Now, as to the heritable property it is not really necessary to say anything. The pursuers had early in the proof to acknowledge that in 1879 Mr. Phillips had no heritable property other than the property in Waddell Street, which he duly disclosed. The supposed separate property in Rutherglen Road turned out on investigation to be simply a part of the Waddell Street property, which extended round the corner into Rutherglen Road, and which it appears was duly included in Mr. Binnie's valuation, on which the discharge proceeded.

The controversy is, therefore, in substance confined to the shipping company's shares, and as to that my view is this:—

I am satisfied upon the evidence that the shares in question were really, as the defenders allege, of no saleable value in the year 1879. They existed, no doubt, as shares in what may be called a going company, but I think it is sufficiently proved that they were at that time worthless, so that if realized, or sought to be realized, by the deceased or the liquidators, they would have fetched nothing. The company had been in existence for some years, but had paid no dividends. In fact, it had accumulated a debit balance nominally of over 3600*l*., but really (with depreciation allowed for) of over 6300*l*.—being more than one-fifth of its capital. Its ships were of an unsuitable class. The market generally was depressed,

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and there were no signs of improvement. Even judging by subsequent results, no dividends were paid for some years afterwards; and these were of small amount, and (allowing for depreciation) were really paid out of capital. Moreover, although when the company was wound up and its ships sold in 1889 there was a return of capital to the shareholders of about 12*s.* 8*d.* per pound, that occurred, it is, I think, clearly proved, in a wholly different condition of the shipping trade, and when the company's position had been thereby and otherwise materially improved.

This being the fact, I am not prepared to affirm that the omission of those shares from Mr. Phillips' statement of his assets detracted in any reasonable sense from its truth. In any case, it appears to me that the omission to set forth an asset which was in the position which I have described cannot possibly be construed into a fraud. Probably the proper course would have been to have entered the shares in the statement, putting against them a nominal value; but that would have been a difference of form and not of substance.

I am accordingly of opinion that the Scotia Company's shares are really in the same position as the reversionary interest in Mr. Potter's estate, which had to be considered in the case of Bain. And that, as I indicated at the outset, makes it unnecesssary to consider whether the pursuers are entitled to have it assumed that the shares in question were not in fact disclosed to Mr. Cameron—I mean the late Mr. Cameron (one of the liquidators) who resided in Glasgow, and with whom Mr. Phillips transacted. I may say, however, to a large extent for the same reasons as I have endeavoured to state in the case of Bain, I do not consider that the pursuers are entitled to make this assumption. Mr. Phillips and Mr. Cameron were both in Glasgow, and were probably, and indeed presumably, in personal communication. The shares being what they were, it was not unnatural (assuming perfect honesty) that they should be omitted from Mr. Phillips' formal statement and mentioned in conversation. And, on the other hand, it is extremely difficult (assuming dishonesty) to believe that Mr. Phillips should, while surrendering everything else, have imperilled his discharge by concealing assets which, in the most sanguine view possible, had so little even prospective value.

On the whole matter, therefore, I am of opinion that the pursuers have failed in this case as in the other, and that the defenders are entitled to absolvitor.

BAIN'S APPEAL.

Opinion delivered by LORD KYLLACHY (Ordinary) on June 13, 1903.

When this case was formerly before me I held that enough appeared upon the admitted facts to exclude the action either as against the trustees, or as against the beneficiaries called for their interest. That is to say, I held that the action was excluded by the long and undue delay in bringing it, and the prejudice which had thereby arisen to the defenders' position. On reclaiming note it appeared to the Inner House that, even on this initial question, the exact facts should be ascertained; and also that the inquiry thus necessary should comprehend the whole matter relevantly at issue. A proof having accordingly been allowed, it was lately led, and the case is now in the position of a concluded cause.

In the view which I have come to

take on what I may call the merits of the pursuers' claim, it is not perhaps necessary that I should deal at length with the whole defences maintained by the defenders; but as the argument which I lately heard, traversed the whole ground, and as at least on one point there appears to have been misunderstanding, due, I am afraid, mainly to some language of my own in a recent judgment, I think it may be well that I should deal generally with the whole case.

The defenders' first contention was this—that, assuming everything else in the pursuers' favour, it was now established, if it did not before appear, that at least as against the defenders (Mr. Bain's trustees) the action was met by a good defence. The trustees are, it will be observed, called upon to bring with them, exhibit and produce the discharge granted to the truster, of which reduction is sought, and to hear and see the same reduced and declared void; and that being done, decree is asked against them, as the deceased's trustees, to make payment to the pursuers of the sum of 63,187*l.*—"reserving always to the pursuers all claims competent to them against any other persons" (i.e., the beneficiaries afterwards called for their interest) "liable to them, the pursuers in the premises." The assumption of the action, therefore, is that the trustees are still possessed of the whole or part of the trust estate, or have at least still duties with respect to it, and to its ingathering and administration—duties which the pursuers as alleged creditors are entitled to enforce. And, perhaps, until the contrary appeared, the pursuers were entitled to make that assumption. But the question now is whether the assumption was well founded. The trustees maintain the contrary. They say, and I think have established, that they long since ceased to have any connection with the trust estate; that they long ago administered and distributed it in due course; and that having done so they were formally and fully discharged, not indeed judicially as under a multiplepoinding and exoneration, but by—what is equally good — an extra-judicial discharge granted by the whole beneficiaries. They say that they are thus functi officio—that they have no longer any duty or, for that part, any title to sue actions or ingather assets—and that their position is in effect that merely of mandatories whose mandate has been executed and has expired. They further point out that, as affirmed by numerous decisions, the remedy of a creditor who has omitted to claim during the subsistence of a trust is (at all events in the absence of any suggestion of malversation) to proceed against the beneficiaries direct, each beneficiary being liable just in the same way as if he had accepted directly a gratuitous conveyance from the deceased truster.

Now the pursuers do not dispute that all this is true. They make no suggestion of malversation. They disavow any intention of using their decree, if they get it, to the effect of establishing as against the trustees any personal liability. They do not ask that the trustees shall resume their trust and proceed against the beneficiaries. As their summons bears, they propose to do that themselves. In short, they do not suggest that the decree which they ask, if they get it, could be in any way put in force. But what they maintain seems to be this—that they are entitled, as against the trustees, to what they call a decree of constitution—by which I suppose they mean—not an ordinary decree of constitution, which is, of course, always enforcible — but a

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decree cognitionis causa tantum—a decree which, as we all know, is granted in a particular case, namely, where an heir, who, being liable for his ancestors's debts if he accepts the succession, renounces the succession, and by doing so leaves the estate open to the diligence of the ancestor's creditors. In that case there is no doubt granted a decree of constitution cognitionis causa. But the decree is granted against the heir—the person who has or had the beneficial interest; and its purpose is simply to ascertain that the person having the beneficial interest does not dispute the debt.

The question, therefore, is whether that is the kind of decree which the pursuers here really ask, and if so, whether they are entitled to get it.

Now I am of opinion that they are not. Whatever it may be called, the decree here sought is, unless I entirely misunderstand the matter, quite *unnecessary* for the pursuers' purpose. They do not require anything of the kind to enable them to go against the beneficiaries, who are their true debtors, if they have any. But further, and in any case, the decree sought would be *futile*. It could establish nothing against the beneficiaries. Although the trustees appeared and litigated, no judgment obtained against them would be res judicata against the beneficiaries, or indeed against anybody. And that really is, it appears to me, to be the test of the matter.

It seemed, no doubt, to be suggested that testamentary trustees are always trustees for the creditors of the deceased, and so cannot be discharged until all the creditors are paid; but that is an error which was corrected so far back as the case of the *Globe Insurance Co.* v. *Scott's Trustees*, (1849) 11 D. 618; (1850) 7 Bell's App. 296. The trustees and executors of a deceased stand in no fiduciary relation to his creditors. They are simply debtors—debtors with limited liability, but still only debtors just as the deceased was a debtor; and their liability, such as it is, terminates when, the creditors having omitted to come in and claim, they have in due course paid away the estate to the beneficiaries. All this is explained at length in Lord Fullarton's judgment in the case referred to, the decision in which was affirmed in the House of Lords.

It therefore appears to me that the trustees here are entitled to be assoilzied, and to be so whatever may be the result of the action as against the beneficiaries. And, indeed, I doubt whether the contrary would have been seriously maintained were it not for a supposed decision of the point in the case of the *Assets Co.* v. *Falla's Trustees*, (1894) 22 R. 178, or perhaps rather for a gratuitous and, I am afraid, not well-considered observation in my own judgment in that case—an observation not essential to the judgment, but which somehow escaped correction in the Inner House.

In the case of *Falla's Trustees*—as in the present case—there was a conclusion against testamentary trustees for reduction and payment. There was also (in a supplementary action which was conjoined) a conclusion for reduction against the beneficiaries. The main and only important question in the case was as to the Court's jurisdiction over the beneficiaries. But there was a plea going to what was called the "competency" of the action as against the trustees, which plea was maintained on the strength of a discharge which was set forth in the defences, but which, so far as it imported a complete discharge, was not admitted by the pursuers. The plea was, of course, repelled as a plea to competency. For an action is not incompetent, any more than it is irre-

levant, merely because, as it turns out, it is open to a successful defence. But as regards the substance of the defence founded on the discharge, what happened was this: I held that the admission of the discharge was insufficient, and accordingly allowed a general proof, and to this the Inner House adhered. But I appear to have added that, even if the discharge was admitted, the decree asked against the trustees might still be granted as a decree of constitution. And this, as I think unfortunate observation, although not adopted, was not corrected in the Inner House. That is really the whole foundation for the pursuers' contention that the point now in question was decided in the case of Falla.

It therefore appears to me that the defenders are right in their initial contention. Whatever may be the result of the action as against the beneficiaries, the *trustees* seem at least to be entitled to absolvitor.

The next point is whether, looking to the frame of the action, the pursuers could obtain any operative judgment against the *beneficiaries*. I confess I think it is extremely doubtful whether in any case they could do so. For the beneficiaries are only called for their interest—that is to say, to hear and see decree pronounced against the trustees. And ex hypothesi that decree is *not* pronounced; and, even if pronounced, would be as against the beneficiaries a dead letter. Waiving, however, that difficulty, one thing at least seems certain, namely, that if the beneficiaries are to be held as competently called for their interest, they must at least be allowed to plead in this action all pleas which they might properly plead in an action directed against themselves. And in that view the question arises whether, now that the facts have been ascertained, I can refuse to repeat, for what it may be worth, my previous finding that the pursuers' action is barred by mora—that is to say, by undue delay operating necessarily or presumably to the defender's prejudice.

Now, as to that, I have only to say that I think the proof has tended rather to emphasize than otherwise the considerations on which I previously proceeded. I see therefore no reason to change my former opinion, and I think it enough simply to say so.

It remains, however, to consider the pursuers' case on what I have called its ultimate merits. We now know all that is to be known as to the two promissory notes by Mr. Bain's two sons. We also know all that is to be known about the reversionary interest in Mr. Potter's estate, which is said to have vested in Mrs. Bain, and through her, as the law then stood, in her husband. And the question to be considered is whether there has been made out as against Mr. Bain a case of concealment—that is to say, intentional and fraudulent concealment such as is, I think, here required—with respect to either or both of these alleged assets of his estate. I think that is and must be the issue, for, whether necessary to the results or not, I have formed the opinion, following the views expressed by the judges of the First Division in the case of the *Liquidators of City of Glasgow Bank* v. *Assets Co.*, 10 R. 676, that upon the just construction of Mr. Bain's declaration he did not warrant his statement of his affairs as true—otherwise than as true to the best of his knowledge and belief.

Now, this being so, the result of the recent proof is, to the best of my judgment, this: In the first place, the supposed discovery made after the action was raised, that Mr. Bain concealed an alleged vested reversionary interest in Mr. Potter's estate, turns

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out, if I may so put it, to be a mere nidus equinus. The charge as a charge of fraud was difficult enough to begin with. It involved (1.) the assumption that Mr. Bain was so far an expert in the law of vesting, and also in the law of husband and wife, that he realized in 1879 that he had rights under Mr. Potter's settlement—rights the existence of which did not then or afterwards suggest themselves to the eminent solicitors whose business it was to wind up the succession. It involved (2.) the further assumption that, because a reversionary interest arising on the expiry of life interests, and subject to other contingencies, attained in the events which happened a substantial value in 1888, it had therefore a substantial value in 1879. But (3.) and lastly, it altogether overlooked the circumstance that, even as the law stood in 1879, estate coming to a wife did not pass absolutely to her husband, but did so subject always to the provisions of the Conjugal Rights Act of 1861. Mr. Brown's and Mr. Warden's evidence places this matter in the clearest light, and no impeachment of their figures was attempted; and yet, unless they are hopelessly wrong, the result is that so far from Mr. Bain or Mr. Bain's creditors having in 1879 any substantial or realizable interest in Mr. Potter's estate, the interest, if it existed at all (which involves a point in the law of vesting which I have not considered), was, after satisfying the provisions of the Act of 1861, really a minus quantity.

The whole question, therefore, comes to depend upon the alleged concealment of the two promissory notes. Now, I think the promissory notes ought to have been disclosed. They were, I think, assets of Mr. Bain's estate. They were no doubt assets of a very special character—assets of which creditors, or even liquidators, might well be disposed to take no account. They were, perhaps, also assets which might naturally enough be omitted from Mr. Bain's statement and declaration and reserved as a subject of explanation and personal conference with the liquidators. I say so, because I entirely accept the evidence of the Messrs. Bain, who were most careful and candid witnesses. I quite believe what they said, namely, that they at least always understood that, although vouched by promissory notes, the advances in question were not loans or intended as loans, but were simply advances to account of patrimony. Indeed, I think it highly probable that such, truly, was Mr. Bain's intention. But still the contents of the two promissory notes were, I think, assets of his estate. One of the two—that representing the advance to James—was probably quite recoverable; and while I quite accept all that was said as to the true intentions of parties, the fact remains that neither of the sons could say that their father to their recollection ever said anything *to them*, or committed himself by act or word so as to bar his legal rights in the premises. Moreover, James certainly paid interest, and when asked (although very apologetically) to do so, in 1879 repaid 200*l.* of principal to enable his father to settle with the liquidators. I am not therefore prepared to affirm that, at all events, James Bain's advance was, or would have been, otherwise than an asset in bankruptcy, if his father had been sequestrated.

But all this being conceded, the pursuers are not much benefited; for the question remains whether they have proved so as to enable the Court to affirm as a thing beyond reasonable doubt that, as regards these promis-

sory notes, Mr. Bain did in fact fail to inform the liquidators of the true position. And my conclusion upon the evidence is that the pursuers have not so proved. I am not satisfied that Mr. Bain failed to disclose the facts, such as they were, to the liquidators. There is certainly no presumption, to begin with, that he so failed. The presumption, at least to begin with, is that everything was done regularly and in order, and that the transaction was an honest transaction. It is not, I hope, lightly to be assumed that a man of Mr. Bain's position and character should have been guilty of deliberate fraud. Nor is it quite intelligible why, if guilty, he should have preserved the documents which were the evidence of his fraud, and placed them inside of his will to be published, as they in fact were, in his inventory at his death. All this is at least somewhat difficult. And how do the pursuers propose to discharge the onus of proof which thus rests upon them? As I understand it, their case rests entirely on inferences sought to be drawn from the absence, in two documents which are still extant, of any mention of these promissory notes or the transactions which they represent. The two documents are (1.) Mr. Bain's formal statement and declaration, and (2.) a certain memorandum produced by Mr. Haldane containing some jottings with reference to Mr. Bain's case.

Now no doubt if it had appeared that the whole communications between Mr. Bain and the liquidators were in writing and also that all the writings which passed between them were still extant—if it appeared, for instance, that the declaration was the sole basis of the discharge, and that with respect to it no other writings passed and no meetings took place between Mr. Bain and the liquidators—I say if all that had appeared, inferences might, in such circumstances, have been drawn which would have been at least formidable. Perhaps, also, the result might have been the same if Mr. Haldane (who is alive and was examined) had been able to say that he had a distinct recollection of what passed, and that he never heard of the promissory notes, and must in ordinary course have done so, and would, if he had done so, have noted the fact in his memorandum. In point of fact, however, as to all this, the exact contrary is the fact. The communications between Mr. Bain and the liquidators were *not* all in writing. There was at least one meeting after the date of the declaration between Mr. Bain and Mr. Jamieson, and there may have been several. It cannot, moreover, be affirmed that no writings passed, or that what writings did pass are all extant. Mr. Bain's private papers, including those connected with his discharge, were destroyed after his death. Neither can it be said that the discharge proceeded simply on the basis of Mr. Bain's declaration. In point of fact, the liquidator claimed that he should add to the statement of his assets a sum of 400*l.*, which he had drawn in anticipation of the bank's stoppage, and used in paying private accounts. And after at least one meeting with Mr. Jamieson, Mr. Bain (it does not appear why) conceded this point, and proceeded to raise the money, partly, as I have said, by obtaining back from his eldest son 200*l.* of the 500*l.* advanced to him. Then as to Mr. Haldane—he was examined for the pursuers, and rather pressed by their counsel; but he emphatically stated that he had no recollection one way or the other as to whether he knew of the

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advances in question, or whether Mr. Jamieson knew, or whether they were or were not the subject of consideration by him or by Mr. Jamieson. He thought it quite possible that he might have heard of them, and he absolutely declined to say that his "Memo." of jottings enabled him to draw any inferences one way or the other. His jottings, he explained, merely related to matters with which he personally dealt, and, so far as Mr. Bain's case was concerned, they related only to the matter of the 400*l.*—a matter which he referred to Mr. Jamieson. Altogether it did not seem to me that the pursuers took much benefit by Mr. Haldane's evidence, or by the evidence of Mr. More, who was held as concurring. And therefore the case of the pursuers comes back just to this—that it rests entirely on Mr. Bain's declaration, and depends really on this proposition—that the fact of the promissory notes, or the advances which they represent, not being mentioned in the declaration, that circumstance is per se conclusive of non-disclosure, or, if not conclusive, is at least sufficient to throw the whole burden of proof on the other side. Now it appears to me that, having in view the circumstances as I have endeavoured to state them, that is not a proposition which I can affirm. I am not satisfied, and cannot affirm, that Mr. Bain concealed anything which the liquidators were entitled to know. I think that as the evidence stands the presumption is rather the other way. If I were put to it, I should be disposed to say that I think, all things considered, the probability is that there was disclosure, and that Mr. Jamieson at least was told everything. But in any case I do not think that Mr. Bain's declaration proves the pursuers' case. Nor do I think it is, in the circumstances, sufficient even to shift the onus of proof. I am, therefore, on the whole matter, of opinion that my judgment must be for the defenders, and that they are entitled to absolvitor.

[PRIVY COUNCIL.]

In re JOHN McLAUGHLIN.

J. C.*
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April 6.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES IN LUNACY.

New South Wales Lunacy Act, 1898, *s.* 106, *sub-s.* 2; *s.* 110—*Substituted Service on alleged Lunatic—Service on Master in Lunacy—Jurisdiction to dispense with Examination of Lunatic.*

By s. 106, sub-s. 2, of the New South Wales Lunacy Act of 1898, according to its true construction, personal service on an alleged lunatic of a petition by his wife to declare him of unsound mind may be dispensed with when there is evidence on which the Court can conclude that it is inexpedient.

The rules of Court provide that substituted service should be effected on "some adult inmate at the dwelling-house." Where the wife and his two attendants are the only adult inmates, it is within the jurisdiction and discretion of the Court to order service on the Master in Lunacy.

It is also within the jurisdiction of the Court under s. 110 to dispense with any examination of the alleged lunatic, if there is evidence on which it can find that it is inexpedient to examine him.

APPEAL from an order of the above Court, sitting as the Full Court in Lunacy (May 28, 1903), affirming an order of the Chief Judge in Equity (March 10, 1903), whereby he refused to rescind or discharge certain orders made by him on August 1 and 7 and November 18, 1902, and directed a certain account to be taken, and allowed certain costs, charges, and expenses to the person purporting to be the committee of the estate of the appellant.

The question at issue was whether, under the circumstances stated in the judgment of their Lordships, the said order of August 7, 1902, declaring the appellant of unsound mind and giving consequential directions for the management of his affairs, was wrongly made and ought to be rescinded, either on the ground that it was in fact made ex parte and without notice to the appellant; or on the further ground that such

* *Present:* LORD DAVEY, LORD ROBERTSON, SIR FORD NORTH, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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order was made without any examination of the appellant, and without any reason for dispensing with such examination; or on the further ground that in obtaining the said orders the persons applying therefor acted malâ fide and with the deliberate intention of preventing the appellant from being heard. The first ground raised another question, whether a previous order of August 1, 1902, ordering substituted service of the notice on the Master in Lunacy, was rightly made.

Sargant, for the appellant, contended that the effect of the order of August 1, 1902, was to dispense with service altogether. It did not direct substituted service in any proper sense of the term. He referred to the Lunacy Act, 1898, and contended that s. 106 provides that notice shall be given to the alleged lunatic, and, though personal service may be dispensed with if inexpedient, the object aimed at by substituted service is still a real though indirect one: see rule 13, made under s. 169 of the Act. The person directed to be served should be one likely to bring the matter to the notice of the person affected. The Master in Lunacy would refrain from doing so unless expressly directed. The evidence did not justify the making of such an order. The order of August 7 was made without any notice. Sect. 110 prescribes an examination of the alleged lunatic. There was none, and there was no evidence which justified the Court in dispensing with it. The appellant's adjudication as a lunatic ex parte and without examination was contrary to natural justice as well as to the legislation of the Colony. Reference was made to *Hope* v. *Hope* (1) as to the principle on which substituted service is ordered, that there is reasonable ground to suppose that the service will come to the knowledge of the party concerned.

The judgment of their Lordships was delivered by

LORD DAVEY. This is an appeal by a gentleman who was at one time mentally afflicted, but has now recovered and is in full possession of his mental faculties, from an order of May 28, 1903, made by the Supreme Court of New South

(1) (1854) 4 D. M. & G. 328.

Wales sitting as the Full Court in Lunacy. That order confirmed an order of March 10, 1903, made by the Chief Judge in Equity, which latter order was made upon an application (which their Lordships will assume was properly made) to set aside certain previous orders of the Court in Lunacy of August 1, August 7, and November 18, 1902. The substance of the matter is that the appellant desires to set aside an order by which he was pronounced to be of unsound mind, and a previous order by which service of the application to bring him under the jurisdiction of the Court was directed to be made in a particular manner.

The material facts of the case are as follows. The appellant, who was formerly and, for aught their Lordships know to the contrary, still is, a solicitor in good practice in New South Wales, was admittedly for about two years prior to July, 1902, more or less mentally afflicted. The degree to which his affliction amounted to unsoundness of mind probably varied from time to time, but that he was what is commonly called of unsound mind for those two years, at any rate, was not questioned by his counsel. In July, 1902, Mrs. McLaughlin presented a petition to the Supreme Court for the purpose of having him declared a person of unsound mind and incapable of taking care of himself or managing his affairs, and for the appointment of a committee. Thereupon, on August 1, 1902, an order was made that service of Mrs. McLaughlin's petition and the affidavits sworn and filed in support thereof upon Henry Francis Barton, Master in Lunacy of the Court, should be deemed good and sufficient service of such petition and affidavits upon Mr. McLaughlin. This is the first order which the appellant desires to get rid of.

The power to make an order for substituted service is given by s. 106, sub-s. 2, of the Lunacy Act of 1898, which is in these words: "Where personal service cannot be effected or is inexpedient, then substituted service may be effected in such manner as may be prescribed by rules of Court, or as may be ordered by the Court." Three constructions have been given to that section. One construction—the construction adopted by Walker J. in the Full Court—was to the effect that the

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sub-section is to be read reddendo singula singulis, i.e., that where personal service cannot be effected, substituted service may be effected in such manner as is prescribed by rules of Court, but where personal service is inexpedient, then substituted service may be effected as ordered by the Court. Their Lordships do not think that that is the true construction of the sub-section. The construction suggested by the learned counsel for the appellant is this: That where personal service cannot be effected or is inexpedient, substituted service may be effected in such manner as may be prescribed by rules of Court, or, if there are no rules of Court applicable to the particular case, as may be ordered by the Court. Their Lordships do not think that that construction is the right one. It seems to them much better to read the words of the Act simply, without endeavouring to put any strained construction upon them. The natural meaning of the words appears to their Lordships to be that where personal service cannot be effected, or is inexpedient, then substituted service may be effected, either in such manner as may be prescribed by the rules of Court, or in any special case, where particular circumstances exist, as may be ordered by the Court. In this case the evidence that personal service was inexpedient was overwhelming. There was the evidence of the two doctors, Dr. Manning, who is described as a gentleman of great experience in such cases, and Dr. Dick, who was in regular attendance on Mr. McLaughlin, and of Mrs. McLaughlin herself, and this evidence goes to shew that the appellant's state of mind was such that the personal service of the petition was extremely likely to aggravate his malady. One of his strongest delusions was that he was being hypnotised by his wife, for whom he had apparently conceived a perfectly unreasonable dislike, though Mrs. McLaughlin had shewn him all the care and attention which it was possible to bestow upon him. In those circumstances one can easily understand how personal service of his wife's petition to have him declared of unsound mind and to have his person and estate placed under control might irritate him to such an extent as to increase his unhappy malady or retard his recovery. At any rate, whether that was sufficient reason

or not, the Court thought it was. It is impossible to say that there was not evidence on which the Court could come to the conclusion that personal service was inexpedient.

Then the question arises upon whom service should be made. The rules say it is to be made upon "some adult inmate at the dwelling-house." The only available adult inmates at the dwelling-house besides Mrs. McLaughlin herself were said to be the two attendants who were waiting on the appellant. If they had communicated the effect of the petition to him, it seems tolerably clear that it might have had precisely the same effect as if the petition had been served upon him by an officer of the Court. The Court therefore took the course which, as appears from the statements of the learned judges, has not been unusual in the exercise of this jurisdiction, i.e, they directed the petition to be served on the Master in Lunacy, leaving it to the latter, who is a person of experience and has the command of the services of experts in matters of this kind, to take such steps as might seem to him expedient, and to do all that was necessary for insuring that the matter of the petition was properly sifted and investigated, that it was bonâ fide and supported by the proper evidence, and that everything was done that could usefully be done for protecting the interests of the alleged lunatic. Whether that was a wise course or not, or whether the procedure is open to criticism or not, at any rate it was within the jurisdiction of the Court. It must be remembered that this particular jurisdiction is one of some peculiarity and difficulty. It exists for the benefit of the lunatic, and the guiding principle of the whole jurisdiction is what is most for the benefit of the unhappy subject of the application. It has been pointed out that this order for substituted service differs from the usual cases where substituted service is only allowed when personal service cannot be effected, whereas in this case it is allowed because personal service is inexpedient. In ordinary cases, in considering upon whom substituted service should be made, the primary consideration is as to how the matter can be best brought to the personal attention of the person in question himself. But that is not the case in lunacy. There it may be highly inexpedient that

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the matter should be brought to the alleged lunatic's personal attention. Where it is considered inexpedient that personal service should be effected, it may be, though it does not by any means follow, that in selecting the mode of substituted service regard should be had to the same considerations as apply in ordinary cases of serving a writ or other legal process. But in all cases the Court has to consider what in all the circumstances of the case is most for the benefit of the patient and for his protection. In their Lordships' opinion, therefore, the learned counsel for the appellant was not justified in saying that this proceeding was equivalent to a proceeding ex parte in the sense in which he used the term, and they think that the order made was within the jurisdiction of the Court and within the powers given to the Court by the Act of Parliament to direct service in that way. That disposes of the order of August 1, 1902.

As to the order of August 7, 1902—the order by which the Court declared that Mr. McLaughlin was of unsound mind and appointed a committee—very little remains to be said on it, when the objections to the order of August 1 have been disposed of. One objection to it is that it was made ex parte; but that objection has already been dealt with. The next objection is that there was no personal examination of the alleged lunatic. Sect. 110 of the Lunacy Act provides for a personal examination of the alleged lunatic, either by the Court or by a jury, according to whichever way the trial is conducted; but it is provided that "if it appears to the Court to be unnecessary or inexpedient that such person should be examined by the Court or the jury, the Court may in lieu of the examination aforesaid direct the master personally to examine the said person and report on such examination, or may dispense with any examination whatever." The order of August 7 states that the Court "in pursuance of the powers vested in it by s. 110" of the Act did "dispense with any examination of John McLaughlin." There, again, it may have been wise, or unwise, to exercise the jurisdiction vested in the Court, but what has to be shewn is that the Court exceeded its powers. Their Lordships cannot say that the

Court has done so. The Court had jurisdiction to say whether in the circumstances it would or would not dispense with any examination whatever. Their Lordships are of opinion that the jurisdiction to dispense with the examination of the alleged lunatic is one which should be exercised with great caution, but it is not within their province on this appeal to say whether the Court acted wisely or unwisely; the only question for them is whether the Court acted within the powers entrusted to it. Counsel for the appellant suggested that there was no evidence upon which the Court could come to the conclusion it came to; but the affidavits of Dr. Manning, Dr. Dick, and Mrs. McLaughlin describing the appellant's state of mind—though primarily directed to the question whether personal service could be dispensed with—were good evidence on which the Court might, if it thought fit, also determine the question whether personal examination should be dispensed with.

The subsequent proceedings may be shortly stated. The appellant, having learned of the order that had been made, applied on September 15, 1902, to rescind the previous orders, which he had a perfect right to do, either on the technical ground that they had not been made in accordance with the powers of the Court, or on the merits, i.e., that the Court had come to a wrong conclusion when it declared him to be of unsound mind. The appellant apparently disputed the correctness of the order of August 7, 1902, both on the technical ground referred to and on the merits.

That application was adjourned, and on October 9 the appellant gave an amended notice of motion and the matter came on for hearing before the Chief Judge in Equity. The affidavits which had been made were read, the persons who made them were cross-examined at great length, and other oral evidence was given as to the state of the appellant's mind on August 7, and subsequently up to the date of the hearing of the motion. The hearing lasted seven days, and ultimately, on November 18, 1902, the Chief Judge in Equity gave his judgment. After a very careful review of the evidence he came to the conclusion that Mr. McLaughlin was not only of unsound mind at the date when the order was made, but that

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he had not satisfied the Court that he was then of sound mind, and he accordingly dismissed the motion. A second motion was then made for the same purpose and was heard by the Chief Judge in Equity on March 10, 1903, without any objection that the question had been already decided. His Honour then said that he did not see his way to set aside the previous orders, but having regard to affidavits which had since been filed he was satisfied that Mr. McLaughlin was then of sound mind, and accordingly he ordered what was in effect a supersedeas.

There was an appeal from that judgment, so far as it refused to set aside the earlier orders of August 1 and 7, 1902. Mr. McLaughlin's reason for seeking to set aside the orders is very candidly given by him in the short discussion after the judgment of the learned judge. "The reason," he says, "why I sought to have the order set aside was to prevent this case from constituting a precedent and to prevent non-service of proceedings in future." This shews a very creditable zeal for the public interest; but, assuming that the appellant was in fact of unsound mind on August 7, there are no sufficient materials before their Lordships to shew that the orders complained of had resulted in any injury to him. However, he appealed, and the matter was reconsidered by three learned judges in the Full Court, who delivered very full opinions on the question whether the orders of August 1 and 7 were within the powers of the Court, and were proper orders to be made at the time they were made, and they all came to the same conclusion as the Chief Judge.

Their Lordships agree in substance with the reasons given by those learned judges, and need not, therefore, repeat them. They will accordingly humbly advise His Majesty that this appeal ought to be dismissed.

Their Lordships will only add that they feel quite as strongly, as it was properly urged upon them by counsel for the appellant, that the interest of persons alleged to be of unsound mind and of all His Majesty's subjects ought to be jealously protected against any attempts of designing people, or of people acting innocently but mistakenly, to place either

their persons or their property under restraint; but in this case their Lordships do not think that the powers of the Court were in any way exceeded.

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Solicitors for appellant: *Young, Jones & Co.*

[PRIVY COUNCIL.]

BASTINGS AND OTHERS . . . . . DEFENDANTS;

AND

CALLAGHAN . . . . . PLAINTIFF.

J. C.* 1905 *April* 12; *May* 12.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand Magistrates' Courts Act, 1893—*Jurisdiction of Stipendiary Magistrate—Petition for Inquiry into a Licensing Poll—Alcoholic Liquors Sale Act of* 1895.

Although under the New Zealand Resident Magistrates Act, 1867, the jurisdiction of magistrates was purely local, yet under the Magistrates' Courts Act, 1893, stipendiary magistrates appointed thereunder do not hold office for particular districts, but possess a general jurisdiction throughout the whole Colony, controlled in practice by departmental arrangements.

Where a stipendiary magistrate receives in an official capacity in any part of the Colony a petition presented under the Alcoholic Liquors Sale Act of 1895 for inquiry into a licensing poll, and assumes the duty of dealing with it, he has jurisdiction to act.

The Act of 1895 directs the inquiry to be made in the manner prescribed by s. 48 of the Regulation of Local Elections Act, 1876, which refers to the Court of the district resident magistrate appointed under the Act of 1867 at that time in force. But, *held*, that under s. 6 of the Act of 1893 such reference must be construed as if made to a stipendiary magistrate.

APPEAL from a judgment of the above Court (April 28, 1903) affirming that of the Supreme Court (March 3, 1903).

On December 13, 1902, the appellants and others filed a petition, in the form provided by the 6th schedule to the Local Elections Act, 1876, in the office of the Magistrate's Court at Port Chalmers, declaring that they believed that the licensing poll recently taken for the electoral district of Chalmers and

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the declaration of its result were void, and praying that an inquiry might be made under the provisions of the Local Elections Act of 1876, with consequent relief according to the result of the inquiry. Mr. Graham thereupon, as a stipendiary magistrate of the Colony, gave notice that an inquiry would be held; and upon his jurisdiction being denied, held in its favour. Thereupon the respondent instituted this action against Mr. Graham and the appellants, praying for a writ of prohibition to restrain him from hearing or deciding the case.

The respondent alleged that Mr. Graham was a stipendiary magistrate appointed under the Magistrates' Courts Act, 1893, but had no defined duties as such magistrate, not having been appointed to the charge of any district under the Act. It also alleged that Mr. Carew was the magistrate at Port Chalmers.

The appellants contended that no stipendiary magistrate is appointed to the charge of any particular district under the Act of 1893, and that Mr. Graham usually exercised his jurisdiction at Dunedin and Port Chalmers. According to an affidavit of Mr. Carew, Mr. Chalmers took up the petition in this case by arrangement with him.

Williams J. ordered that the prohibition should issue.

In the Court of Appeal the majority of judges, including the Chief Justice, dismissed the appeal, Edwards and Denniston JJ. dissenting.

The judgment of the majority, after referring to various provisions in the Act of 1893 as recognising a local or quasi-local jurisdiction of the magistrates, although they were appointed for the Colony, proceeded:—

"The Regulation of Local Elections Act meant to give and gives the jurisdiction to a particular magistrate. He is selected and defined as the resident magistrate of the Court in which the declaration, equivalent to a petition, is filed. If there is, therefore, some stipendiary magistrate who can be called the magistrate of the Court at Port Chalmers in which the declaration was filed, that magistrate is the person pointed out by the Act as the magistrate having jurisdiction to hear the petition. This was not disputed, but it was said there was now under the Magistrates' Courts Act, 1893, no particular magistrate that

answered that description. All the magistrates of the Colony, it was said, were magistrates of the Port Chalmers Court. We are of opinion the Court cannot ignore the various provisions in the 1893 Act, in which there is a quasi-localisation of a magistrate. It is no answer to say to this position that words have got into the Act by inadvertence. They are there. And if they are there, then they must operate to fulfil the manifest intention of the 1876 Act, that the magistrate usually exercising the jurisdiction of the Court at a particular place is the magistrate that is to hold the inquiry. If s. 16 had stood alone in the Act, we think it would have been sufficient to shew that there was recognised a particular magistrate that was in a sense a magistrate 'of such Court' at Port Chalmers different from the other magistrates. There are, however, as we have said, many other sections that recognise in a certain way a local acting of a magistrate. We are therefore of opinion that there are sections of the Act of 1893 that point out a particular magistrate as the magistrate whose duty it is to exercise the statutory jurisdiction of hearing the petition, and that he is the person who 'usually exercises' jurisdiction at Port Chalmers."

Haldane, K.C., and *H. Courthope-Munroe*, for the appellants, contended that Mr. Graham had jurisdiction to hear the petition in question. The Act of 1895, under which it was filed, does not direct that it should be heard by a resident magistrate or by the magistrate who usually presides in the Court of the district in which it is filed. It provides that the inquiry into a disputed poll shall be held in the manner provided by s. 48 and following sections of the Act of 1876. No doubt the expression "resident magistrate" occurs in that section. But it was used in reference to the Act of 1867 which was then in force, under which there were resident magistrates with purely local jurisdiction. Under the Act of 1893 resident magistrates with local jurisdiction were abolished, and stipendiary magistrates were appointed without any territorial limit of jurisdiction, who could sit in any Court. And s. 6 of the Act of 1893 provided in effect that the reference to resident magistrate in the Act of 1876 should be construed as

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meaning stipendiary magistrate under the Act of 1893. Consequently Mr. Graham had authority to deal with this petition, and, having assumed jurisdiction, could not be deprived of it or restrained from exercising it.

The respondent did not appear.

1905 *May* 12.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The question raised on this appeal is whether Mr. Graham, a stipendiary magistrate within the Colony of New Zealand, duly appointed under the Magistrates' Courts Act, 1893, had jurisdiction to hear a petition in the matter of the Alcoholic Liquors Sale Control Act Amendment Act, 1895, which was filed in the office of the Magistrate's Court, Port Chalmers. The question turns upon the construction of the Act of 1895, and involves consideration of provisions in three other Acts, the Regulation of Local Elections Act, 1876, the Act of 1893, and the Resident Magistrates Act, 1867, which the Act of 1893 repealed.

There was no appearance at their Lordships' bar on behalf of the respondent. But, inasmuch as the question depends simply on the meaning and effect of certain statutory provisions, and as the arguments on the one side and on the other are presented very fully and ably by the learned judges in the Court of Appeal, who differed in opinion, their Lordships are at less disadvantage than usual in dealing with an appeal ex parte.

By s. 3 of the Act of 1895 it is provided that no licence shall be granted or renewed until the electors of the district shall have determined whether the number of licences in the district shall be continued or be reduced, or whether no licences shall be granted in the district. Then follow provisions for the taking of a licensing poll. By s. 7, sub-s. 1, paragraph (*o*), it is provided that if the result of any poll is disputed, any fifty electors may require an inquiry to be held in manner provided by s. 48 and the subsequent sections of the Act of 1876, and that the matter in dispute shall be determined in the same manner, mutatis mutandis, as if the licensing poll were an electoral poll.

By s. 48 of the Act of 1876 it is provided that if within fourteen days after any election any six electors make and sign a declaration in the form set out in the 6th schedule to the Act and "file the same in any Resident Magistrate's Court in the district in which such election took place, or if there is no such Court in the district, then in the Resident Magistrate's Court nearest thereto, the resident magistrate of such Court shall hold an inquiry as to the matter alleged in such petition."

On November 25, 1902, a licensing poll was taken in the electoral district of Chalmers. The result of the poll was declared to be that no licences should be granted in the said district.

On December 9, 1902, the appellants and other electors of the electoral district of Chalmers, being above fifty in number, filed a petition in the office of the Magistrate's Court of Port Chalmers, praying that the declaration of the result of the poll might be declared void.

The petition was brought before Mr. Graham, who occasionally sits at Port Chalmers, though Mr. Carew usually sits there, while Mr. Graham is in the habit of presiding at Dunedin, which is outside the electoral district of Chalmers. Mr. Graham was proceeding to deal with the application when the respondent, who is a storekeeper near Dunedin and an elector of the electoral district of Chalmers, appeared by counsel and objected to the petition being heard by Mr. Graham on the ground that he had no jurisdiction in the matter and that the jurisdiction was vested in Mr. Carew. On motion before the Supreme Court, Williams J. ordered that a writ of prohibition should issue out of the Supreme Court prohibiting Mr. Graham from proceeding to hear the petition. On appeal the judgment of Williams J. was affirmed by the Court of Appeal, Denniston J. and Edwards J. dissenting.

At the date when the Act of 1876 was passed there were in the Colony of New Zealand resident magistrates appointed and holding office under the Act of 1867. By that Act the Government was authorized to constitute throughout the Colony districts to be called resident magistrates' districts, and to

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appoint for each district a resident magistrate to exercise his office therein, who should hold Courts in and for such districts at such time and places as should be deemed most convenient by the resident magistrate, or as should from time to time be appointed by the Governor. The 19th section of the Act provided that the Resident Magistrate's Court of any district should have jurisdiction only where the cause of action had arisen either wholly or in some material point within the district in which the action was brought, or the party sought to be charged was residing or carrying on business, or was served with the process of the Court, within such district.

The jurisdiction, therefore, of resident magistrates and Resident Magistrates' Courts under this Act was purely local.

The Act of 1867 was repealed by the Act of 1893, which contains the following provision in s. 6: "Where in an unrepealed Act . . . . reference is made to any Act repealed by this Act, or to any provisions thereof, or to any Court, office, or officer established, constituted, or appointed under any Act hereby repealed, such reference shall be construed and shall operate as if made to this Act, or to the provisions of this Act corresponding to the provisions referred to, or to the Court, office, or officer constituted or appointed under this Act." By the Act of 1893 the system in force under the Act of 1867 was entirely changed. Magistrates were no longer to be appointed or to hold office for particular districts. There were no longer to be separate Courts with merely local jurisdiction. The very name of the office was altered. Instead of resident magistrates there were to be stipendiary magistrates appointed to hold office "within the Colony." The Magistrates' Court was no longer a collection of separate Courts. It was to be one Court throughout the whole Colony. There is no provision in the Act making one stipendiary magistrate subordinate to another. Apart from any question of "ordinary" or "extended jurisdiction" as provided for by the Act, all stipendiary magistrates are of equal rank and of equal authority. In this respect the Magistrates' Court has been assimilated to the Supreme Court. "Before the Supreme Court Act," as Denniston J. observes, "the judges were appointed to specific districts in which alone they (except

under special circumstances) had jurisdiction. In some cases two judges were appointed to the same district. In such case each judge would be the judge of such district. Under the Supreme Court Act, 1882, these territorial appointments were abolished. Every judge is appointed and acts as judge in every Court in the Colony. In practice judges are in fact resident in and act in separate judicial districts. But this does not affect their jurisdiction or right to sit and act in any part of the Colony. The Supreme Court judge who in practice takes, say, the Wanganui sittings, is no more the judge of that Court than is his colleague."

The opinion of Edwards J. is to the same effect: "Wherever there are two judges or two magistrates," says his Honour, "exercising the same jurisdiction in the same Court and at the same places, the work of the Court must of necessity be distributed by arrangement between them, but neither derives his jurisdiction from such arrangement, nor is his jurisdiction limited by such arrangement. That jurisdiction depends entirely upon his appointment, and it is general. The sphere within which it is to be exercised is, in the case of magistrates, undoubtedly controlled in practice by departmental arrangements, but the jurisdiction is general. Any stipendiary magistrate who, as part of his official duty in accordance with departmental arrangements, from time to time as occasion requires exercises jurisdiction at any place is, in my opinion, one of the magistrates of the Magistrate's Court at that place." In these observations their Lordships concur. This view is sufficient for the determination of the present case, because Mr. Graham, as part of his official duty in accordance with departmental arrangements, does from time to time exercise jurisdiction at Port Chalmers, though he sits there less frequently than Mr. Carew. By arrangement with Mr. Carew, Mr. Graham has taken up this matter, and is apparently peculiarly qualified to deal with it, being chairman ex-officio of the licensing committee of Chalmers under s. 19 of the Act of 1895. Their Lordships, indeed, are prepared to go further. They think that as every magistrate is now a magistrate throughout the Colony and all separate local jurisdiction

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has been abolished in the Magistrate's Court, a stipendiary magistrate who in his official capacity receives a petition presented under the Act of 1895 and assumes the duty of dealing with it has jurisdiction to act.

Their Lordships are, therefore, of opinion that the appeal should be allowed. And they will humbly advise His Majesty to allow the appeal and dismiss the action with costs in the Supreme Court and the Court of Appeal.

The respondent must pay the costs of this appeal.

Solicitors for appellants: *Long & Gardiner.*

[PRIVY COUNCIL.]

J. C.* 1905 *March* 8; *April* 12.

MELBOURNE TRAMWAY AND OMNIBUS COMPANY . . . . . } APPELLANTS;

AND

KIDNEY . . . . . RESPONDENT.

MELBOURNE TRAMWAY AND OMNIBUS COMPANY . . . . . } APPELLANTS;

AND

CORPORATION OF CITY OF MELBOURNE . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Law of Victoria—Licences for Tramway Cars, Conductors, and Drivers—Melbourne Tramway and Omnibus Company's Act, 1883, *ss.* 22, 54—*Liability of Tramway Company.*

Under the Victorian Licensed Carriages Statute, 1864, the Carriages Act, 1890, the by-laws made thereunder, and s. 22 of the Melbourne Tramway and Omnibus Company's Act, 1883, licences must be obtained for the cars, drivers, and conductors employed on the tramways constructed under its powers:—

Held, that the liability to pay for these licences is on the appellants, who

* *Present:* LORD DAVEY, LORD LINDLEY, SIR FORD NORTH, and SIR ARTHUR WILSON.

work the tramways and are owners of the cars and employers of conductors and drivers, and that it was not by the true construction of s. 54 of the Act of 1883 and of clause 14 (4.) of the agreement scheduled thereto transferred to the tramways trust, a body created to exercise the powers of the corporations constituting it in constructing or in working the tramways within their municipal limits, unless and until the trust undertakes the working of the tramways.

CONSOLIDATED APPEALS from two orders of the Supreme Court (March 13, 1902, and Dec. 7, 1903).

The first decision affirmed an order of the Court of petty sessions of Melbourne convicting the appellants of employing for hire a tramcar without having a licence granted. So far as this decision turned upon the applicability of by-law No. 78 of 1880 to the appellants' cars the respondents did not support it. The second decision discharged a rule nisi obtained by the appellants in the Supreme Court to quash a by-law (No. 110 of 1903) of the respondents relating to the licensing of the appellants' tramcars. Both these decisions related substantially to the same subject-matter, the main question decided in both being that the appellants were under an obligation under and by virtue of s. 22 of the Tramway Act (47 Vict. No. 765) to take out licences and pay the fees for such licences in respect of the tramcars run, worked, and owned by them, and in respect of the drivers and conductors thereof. The first decision was given in the case of *Kidney* (as representing the respondents) v. *Melbourne Tramway and Omnibus Co., Ld.*, the case and decision being reported in 27 Vict. L. R. p. 679. The second decision was given in the case of *In the Matter of the Corporation of Melbourne* (the respondents), *Ex parte Melbourne Tramway and Omnibus Co., Ld.* (the appellants).

The principal respondents were the corporation and council of the city of Melbourne, in the State of Victoria, being the licensing authority, with power (inter alia) to make by-laws relating to carriage licences in and for the said city, and within the distance of eight miles from its corporate limits. The respondent Kidney was the duly authorized officer of the respondent corporation. The appellants were a limited company authorized by the Tramway Act to construct tramways

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and to work and run carriages thereon within the city of Melbourne and elsewhere.

The main question raised in these appeals was whether the respondent corporation had authority under the Acts in question, being the said Tramway Act and the Carriages Act, 1890 (54 Vict. No. 1070), to make the said by-law No. 110 for licensing and regulating the carriages of the appellants and the appellants as owners thereof, and the drivers and conductors attendant thereupon, or to require the defendants, their drivers or conductors, to procure and pay for licences thereunder.

The material provisions of the said Acts are set out in the judgment of their Lordships.

In the second case the appellants, on June 23, 1903, obtained a rule nisi ordering the respondents to shew cause why the said by-law No. 110 should not be wholly or in part quashed on the ground that the same was wholly or in part illegal and ultra vires. It was contended that the power to make such by-laws as are referred to in s. 22 of the principal Act applicable to the appellants no longer existed, if it ever existed; that, having regard to the provisions of that Act and its amendments, and particularly to those of clause 14 (4) of the incorporated agreement, so much of the said by-law as purported to make fees payable for the issue of licences was void and ultra vires; that, in any event, so much of the said by-law as purported to forbid the appellants to use, employ, or let for hire for the carrying of passengers any carriage within the city of Melbourne, or within eight miles thereof, was void and ultra vires.

The majority of the Full Court held that the said by-law was applicable to the appellants, and was not illegal or ultra vires as a whole or in part, and had been lawfully made by the appellants, and that the appellants as working and using the said tramways with their tramcars, and, being the owners of such tramcars and the employers of the drivers and conductors thereof, were under obligation under the said 22nd section of the Tramway Act to obtain and pay for licences in respect thereof respectively. Also that the Act must be construed with regard to the state of affairs that really existed, which (as the majority held) was contemplated by the Act in authorizing a

lease of the tramways to be granted to the appellants for thirty years, namely, that the appellants should use, work, and run their tramcars upon the said tramways when constructed by the "trust," and should be responsible for the due and proper working of the said tramways, and should own the tramcars used thereon and employ the drivers and conductors thereon.

The Chief Justice, who dissented from this view, held that, in the events that had happened, having regard to the provisions of s. 54 and sub-s. 4 of the 14th clause of the said agreement in the Tramway Act, the obligations, if any, to obtain and pay for licences under the said 22nd section of that Act rested upon the "trust," and not upon the appellants.

Haldane, K.C., and *Mansfield*, for the appellants, contended that the majority of the Court had not appreciated or given effect to the substitution of the trust in the place of the company, and the transfer to the trust of all the powers conferred by the Act on the company as to the use and working of the tramways. They had also disregarded the application to the trust of the provisions of the Act with respect to such working, and to the conveyance and regulation of the traffic on the tramways. They contended that it resulted from these provisions, when fully appreciated and rightly construed, that the company had neither powers nor obligations under the Act, except so far as the same had been expressly retransferred to the company by the agreement incorporated in the Act by s. 53 and the lease granted thereunder, or by later legislation. It was also submitted that it was only by inserting words in clause 14 (4) of the agreement which are not to be found there that the plain words relieving the appellants of liability to any payment to the trust or the several corporations, other than those which under the agreement the appellants undertook to make, could be got rid of. They contended that, according to the true construction and effect of the Acts in question and of the incorporated agreement, the trust became on its formation subject to all the provisions with respect to the working of the tramways and the conveyance and regulation of the traffic thereon. It was accordingly the trust which was bound to

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observe and perform all the obligations and conditions, and to make all the payments imposed by the Act on the company. All the powers conferred by the Act on the company as to the use and working of the tramways were transferred to and vested in the trust, including the power to run carriages on the tramway. In consideration of the payments prescribed by the agreement which was incorporated in the Act by s. 53 the company was exempt from liability to any other payment, including that for fees and licences. The powers and liabilities of the company are to be found in the agreement, the lease granted thereunder, or in legislation subsequent to the principal Act. Sect. 22 of the principal Act, so far as it relates to the Licensed Carriages Statute, 1864, or to the Carriages Act, 1890, does not on its true construction, which involves, in the events which have happened, substituting therein the "trust" for the "company," operate as regards the appellants. Reference was made to *Corporation of Glasgow* v. *Glasgow Tramway and Omnibus Co.* (1)

Cripps, K.C., and *Nicoll*, for the respondents, were not heard.

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April 12.

The judgment of their Lordships was delivered by

LORD LINDLEY. These two appeals raise the same question—namely, whether the appellants, the tramway company, are liable to pay to the corporation of Melbourne licences for tramcars and for their drivers and conductors. Kidney, the respondent in the first appeal, may be treated as representing the corporation of Melbourne, and although it is now admitted that the order appealed from in the first appeal was wrong, yet as that appeal was brought solely to support the second appeal, it follows that if the tramway company fails on the second appeal the first must fall with it. Both are intended to raise the same question.

The power of the corporation of Melbourne to grant licences and to charge licence duties for public carriages and for their drivers and conductors is conferred by the statutes of the Colony of Victoria known as the Licensed Carriages Statute,

(1) [1898] A. C. 631.

1864, and the Carriages Act, 1890, and by certain by-laws made in 1880 and 1903 under their authority. It is not necessary to dwell upon these statutes and by-laws; it is sufficient to say that under them and under s. 22 of the Melbourne Tramway and Omnibus Company's Act, 1883 (which will be presently noticed) licences have to be got for the cars, drivers, and conductors employed on the tramways constructed under its powers.

Then comes the question, Who is to pay for these licences? It appears to their Lordships, as it did to all the judges in the Colony who have had to consider the case, to be plain that the tramway company is liable to pay licences for their tramcars and drivers and conductors employed on the tramways unless such liability is excluded by the Melbourne Tramway and Omnibus Company's Act, 1883 (47 Vict. No. 765), and the agreement scheduled thereto, and certain Acts amending it—namely, No. 815 (1884) and No. 952 (1887). The tramway company maintains that it is exempted from this liability by the provisions in s. 54 of the Act of 1883, which, it says, has imposed the liability on the tramway trust, and also by the express terms of clause 14 (4) of the agreement scheduled to the Act of 1883. The Courts of Victoria decided this question against the tramway company, but the Chief Justice dissented. Hence these appeals.

The question really turns on the clause 14 (4) of the agreement above referred to, taken in connection with ss. 22 and 54 of the Act of 1883. In order to understand these provisions it is necessary to appreciate the general scheme of this Act. It recited that the making of the tramways therein mentioned would be of public advantage, and that the Melbourne Tramway and Omnibus Company, Limited (i.e., the appellant company), was willing to construct them, and it empowered the company to make the tramways specified in the 1st schedule (s. 3), with the consent of the local authorities of the cities, towns, and boroughs through which they passed. By s. 22 the company was given exclusive power to run carriages with flanged wheels on the tramways, and, "except where otherwise provided for by this Act and subject thereto," the carriages of the company,

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the company as their owners, and their drivers and conductors were to be subject to the provisions of Part I. of the Licensed Carriages Statute, 1864 (now the Carriages Act, 1890). The Act contained a number of clauses not material on the present occasion; and the only other sections which need be referred to are the 53rd and 54th.

The 53rd section confirms the agreement set forth in the 4th schedule, and then follow the words, "and that agreement shall be carried into execution in like manner in all respects as if that agreement were set forth in the body of this Act and were thereby in terms enacted."

The agreement set out in the 4th schedule is between the corporation of Melbourne and eleven other municipal corporations of the first twelve parts, and the tramway company of the thirteenth part. It recites that the tramway company had applied to these corporations for their consent to the Act of 1883, which they had given, and the agreement provides for the construction by the corporations of the tramway through the boroughs mentioned. If more than one of the corporations elect to come in under the agreement, they are empowered to unite in borrowing money to construct tramways within their own municipal limits. To carry out this scheme a corporate body is created called "The Melbourne Tramways Trust," or more shortly, "The Trust" (clause 5), and this trust is to exercise the powers of the corporations constituting it in constructing the tramways within their municipal limits (clause 8). Power is given to the corporations to be substituted for the tramway company in respect of so much of the tramway as may be within their respective municipal limits, and upon being so substituted the trust is to have all the powers of the company "as to the construction, maintenance, use, and working of the tramways within the municipal limits of such corporations." Then comes clause 14, by which the trust is required, within five years after the passing of the Act, to construct, with the approval of the tramway company, all the portions of the tramway within the municipal limits of the corporations represented on the trust; and the trust is to grant a lease for thirty years of the tramway so constructed. For

this lease the tramway company is to pay to the trust interest on the money borrowed for constructing the tramway, and certain percentages to form a sinking fund for paying off the money borrowed; and the company is further to keep the tramway in repair, and hand the same over to the trust at the end of the term in good working order. Then comes the clause on which the whole controversy really turns, and which is as follows:—

(4.) "In consideration of the payments aforesaid the trust shall give to the company possession of the several tramway lines according as such shall be completed and shall be available for the running of carriages thereon, and the company shall during the currency of the lease have the sole right of use of the tramway with carriages having flange wheels or other wheels suitable only to run on the rails of the tramway, and also of demanding and taking the tolls and charges authorized by the Act. Provided always that the company shall not be entitled to exact fares or tolls exceeding those specified in the Act. And the company shall be liable to no other payment to the trust or to the several corporations represented thereon for proportion of profits or otherwise howsoever except for municipal rates."

Sect. 54 of the Act of 1883 is as follows:—

"In the event of more than one of the several corporations named in the said agreement electing as provided in the said agreement to be substituted in the place of the company and upon the formation of the tramways trust mentioned in the said agreement such trust shall be subject to the provisions of this Act with respect to the construction maintenance care and working of the tramways by this Act authorized to be constructed within the municipal limits of the corporation represented on the trust and the conveyance and regulation of the traffic thereon, and shall save as herein expressly provided be bound to observe and perform all the obligations and conditions and make all the payments by this Act imposed on the company with respect to the several matters above mentioned in the same manner and to the same extent and effect as if such trust had been authorized by this Act to construct such

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tramways and had been named in this Act instead of the company."

This Act was followed by the Melbourne Tramway and Omnibus Company's Additional Branches and Amendment Act, 1884 (48 Vict. No. 815), which confirmed and incorporated an agreement between the trust and the company relating to some branch lines. This agreement contained a clause set out in paragraph 12 of the appellants' case. This clause is similar to s. 54 of the Act of 1883 above set out, and applies to the branch lines to which the supplemental agreement particularly referred. There was another amending Act in 1887, but it does not appear to their Lordships to be material on the present occasion.

All the corporations referred to in the agreement in the 4th schedule to the Act of 1883 elected to come in under it, and the trust referred to above was formed. Tramways were constructed as contemplated. A lease of them was granted to the tramway company on the terms mentioned in the Acts, and the tramway company has since been working them. The company is the owner of the cars, and engages their drivers and conductors. Neither the municipal corporations nor the trust work the tramways.

The appellants contend that the last words of clause 14 (4) of the scheduled agreement are to be taken without any restriction, and exempt the tramway company from the payment of the licence duties for the cars and their drivers and conductors. The respondents, on the other hand, contend that the words relied upon by the appellants have no application to carriages, drivers, or conductors, and must be read with reference to what is leased, i.e., the tramway, and nothing else. Their Lordships are of opinion that this restricted construction is the true one and ought to prevail. The case of *Corporation of Glasgow* v. *Glasgow Tramway and Omnibus Co.* (1), which was relied upon by the appellants' counsel, does not appear to their Lordships to be in any way inconsistent with this view.

It is impossible to study the Acts of 1883 and 1884 and the agreements set out in the schedules to them without seeing that

(1) [1898] A. C. 631.

a marked difference is drawn between the trust and the company. The two may be equivalent when (if ever) the trust not only owns the tramways, but works them. Until, however, this happens the tramway and its owners are clearly distinguished in the Act from the cars and their owners. The lease referred to in clause 14 of the agreement in the schedule to the Act of 1883, and in the schedule to the Act of 1884, is confined to the tramways, and has no reference to cars not belonging to the trust. The payments to be made by the lessees are for the use of the tramways, and the exemption from other payments must in good sense be treated as exemptions from other payments in respect of what is leased and paid for. This was the view taken by the majority of the judges of the Supreme Court.

The Chief Justice dissented, and, notwithstanding his exhaustive examination of the various enactments bearing upon the subject, their Lordships are unable to concur with the conclusion at which he arrived. Their Lordships have felt, and do feel, great difficulty in ascertaining the exact meaning and effect in all cases of some of the sections in the Acts; but this difficulty is not sufficient to disturb their view of the true meaning and effect of the clause referred to, when applied to the circumstances with which they have to deal.

Their Lordships cannot accede to the suggestion that in s. 22 of the Act of 1883 the words "the company" should, in the events which have happened, be read as "the trust." This might, perhaps, be allowable if "the trust" owned and ran the cars, but would be wholly unjustifiable in any other case.

Sect. 54 of the Act of 1883, and its equivalent in the agreement in the schedule to the Act of 1884, give rise to greater difficulty. But here, again, their Lordships are unable to see that the effect of these clauses is to substitute "the trust" for "the company," when the trust owns the tramways and "the company" owns the cars and works the traffic on them. The difficulty of doing this is fully dealt with in the judgments of Hodges and Hood JJ. Their Lordships think that the section must be read as imposing upon the trust the obligations

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previously imposed upon the company with reference to the construction, maintenance, and working of the tramways so long and so far as the trust undertakes any of these operations. There is nothing to exempt the tramway company from its obligations so long as it works the tramways. But if and whenever the trust has to do so, and becomes the owner of the cars, and hires the drivers and conductors, it will become liable to pay the licence duties in the place of the company. Great reliance is placed on the words "except where otherwise provided for by this Act and subject thereto" in s. 22; but these words seem to qualify only the application of the Carriages Act to the company, some of the provisions of which (e.g., as to the fixing of fares) are by express words excluded. Their Lordships are quite content to adopt the reasons for their judgment given by the two learned judges who formed the majority of the Court.

It follows from the foregoing observations that the by-laws of 1903 of which the tramway company complains are not ultra vires, and that the tramway company must comply therewith.

The two appeals having been consolidated, their Lordships will humbly advise His Majesty to dismiss them both, and the appellants must pay the costs. As regards the first appeal it is admitted that, as the by-laws then stood, the order appealed from was wrong. But it was shortly afterwards put right for all practical purposes, and an appeal from it was wholly unnecessary.

Solicitors for appellants: *Flegg & Son.*
Solicitors for respondents: *Wadeson & Malleson.*

[PRIVY COUNCIL.]

THE COLONIAL SUGAR REFINING COMPANY, LIMITED . . . . . } PLAINTIFFS;

AND

IRVING . . . . . DEFENDANT.

J. C.*
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Feb. 22;
May 17.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Australian Commonwealth Act, 1903, *s.* 39, *sub-s.* 2—*Construction—Act not retrospective—Right of Appeal in Suit pending when the Act was passed.*

Held, that, although the right of appeal from the Supreme Court of Queensland to His Majesty in Council given by the Order in Council of June 30, 1860, has been taken away by the Australian Commonwealth Judiciary Act, 1903, s. 39, sub-s. 2, and the only appeal therefrom now lies to the High Court of Australia, yet the Act is not retrospective, and a right of appeal to the King in Council in a suit pending when the Act was passed and decided by the Supreme Court afterwards was not taken away.

THIS was an application by the respondent that the appeal be dismissed on the ground that an appeal does not lie as of right in the case except to the High Court of Australia, and that the Supreme Court had no power to grant leave to appeal to the King in Council. The decision to grant it was made by Cooper C.J. (Real J. dissenting), and is reported in 14 Queensland L. J. p. 18.

The judgment appealed from is dated September 4, 1903, and was made on a case stated in an action brought under s. 154 of the Excise Act, 1901, to recover from the respondent, as Collector of Customs for Queensland, moneys paid as excise duty on sugar, levied under the Excise Tariff Act (No. 11 of 1902).

Asquith, K.C., and *V. Hawkins*, in support of the petition, referred to the Commonwealth of Australia Constitution Act (63 & 64 Vict. c. 12), ss. 71, 73, 76, and 77; the Judiciary Act,

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, SIR FORD NORTH, and SIR ARTHUR WILSON.

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1903, ss. 30, 38, 39, this latter being the important section on which the question turns. The alteration made by this section was one of procedure and did not affect private rights, and therefore took effect with reference to pending actions. They referred to *In re Joseph Suche & Co., Ld.* (1); *Attorney-General* v. *Siller* (2); *Towler* v. *Chatterton* (3); *In re Athlumney* (4); *The Ydun.* (5)

Cohen, K.C., Wise, K.C., and *Tyrrell Paine*, for the appellants, contended that the Judiciary Act of 1903 was not retrospective in its operation. It could not defeat a right in existence at the time when the Act was passed. The Act did not deal merely with procedure. It purported to deprive the appellants of a right to appeal to the King in Council which vested in them as of right. This was ultra vires. There was no section in the Commonwealth Act which gave power to deprive any Court of the jurisdiction which it was exercising at the time the Act was passed.

Asquith, K.C., replied.

1905 *May* 17.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is a petition by the Commonwealth Collector of Customs for Queensland, who is respondent to an appeal presented by leave of the Supreme Court of Queensland, asking that the appeal may be dismissed with costs, on the ground that the right of appeal to His Majesty in Council given by the Order in Council of June 30, 1860, under which the leave was granted, has been taken away by the Judiciary Act, 1903, and that the only appeal from a decision of the Supreme Court of Queensland now lies to the High Court of Australia.

By the Commonwealth of Australia Constitution Act, which received the Royal Assent on July 9, 1900, ss. 71, 76, and 77, the judicial power of the Commonwealth is vested in the High Court of Australia, and in such other Federal Courts as the Parliament creates, and in such other Courts as it invests with

(1) (1875) 1 Ch. D. 48.
(2) (1864) 10 H. L. C. 704, 762.
(3) (1829) 6 Bing. 258; 31 R. R. 411.
(4) [1898] 2 Q. B. 547.
(5) [1899] P. 236.

Federal jurisdiction. In certain specified matters the High Court is invested with original jurisdiction, and Parliament is empowered to confer original jurisdiction in other specified matters, including any matter arising under the Constitution, or involving its interpretation, or arising under any laws made by the Commonwealth Parliament. With respect to all these matters the Parliament is empowered to make laws defining the jurisdiction of any Federal Court other than the High Court, and defining the extent to which the jurisdiction of any Federal Court shall be exclusive of that which belongs to, or is invested in, the Courts of the States, and investing any Court of a State with Federal jurisdiction.

Acting under a Commonwealth Act called the Excise Tariff, 1902, the Collector of Customs for Queensland required the appellants, the Colonial Sugar Refining Company, Limited, to pay 20,100*l.* excise duty in respect of 6700 tons of sugar. The appellants disputed the claim. So they deposited the money with the Collector in accordance with the provisions of the Excise Act, 1901, and then brought this action against the Collector to recover the sum deposited. The writ in the action was issued on October 25, 1902. Under the Rules of the Supreme Court a special case was stated by the parties for the opinion of the Full Court. The case was set down for argument in July, 1903, but it stood over until the September sittings of the Court. On September 4, 1903, the Court decided that the Government was entitled to retain the duty, and gave judgment for the Collector with costs. In the meantime the Judiciary Act, 1903, had been passed. It received the Royal Assent on August 25, 1903. By s. 38 the jurisdiction of the High Court in certain specified matters is made exclusive of the jurisdiction of the several Courts of the States, and by s. 39 it is made exclusive in all other matters except as therein provided. Sub-s. 2 of s. 39 provides that the several Courts of the States shall be invested with Federal jurisdiction in all the matters above mentioned except those specified in s. 38, subject to certain conditions and restrictions, one of which is that every decision of a Court of a State from which, at the establishment of the Commonwealth, an appeal lay to the Queen in

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Council, shall be final and conclusive except so far as an appeal may be brought to the High Court.

The appellants, being dissatisfied with the judgment of the Supreme Court of September 4, 1903, applied to the Court for leave to appeal to His Majesty in Council. The application was heard by Cooper C.J. and Real J. The learned judges differed in opinion. The Chief Justice thought that leave ought to be granted. Real J. was of the contrary opinion. In accordance with the Order in Council of June 30, 1860, the opinion of the Chief Justice prevailed, and leave to appeal was accordingly granted.

The case was fully argued before this Board. On behalf of the appellants it was contended that the provisions of the Judiciary Act, 1903, on which the respondent relies, assuming them to be within the powers of the Commonwealth Legislature, are not retrospective so as to defeat a right in existence at the time when the Act received the Royal Assent.

As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, Was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be

held to act retrospectively unless a clear intention to that effect is manifested.

Their Lordships, will, therefore humbly advise His Majesty that the petition ought to be dismissed. The petitioner will pay the costs of the petition.

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Solicitor for petitioner: *J. H. Galbraith.*

Solicitors for appellants: *Paines, Blyth & Huxtable.*

[PRIVY COUNCIL.]

NATIONAL TRUSTEES COMPANY OF AUSTRALASIA, LIMITED . . . . } DEFENDANTS;

AND

GENERAL FINANCE COMPANY OF AUSTRALASIA, LIMITED . . . . } PLAINTIFFS.

J. C.* 1905 *March* 15, 18; *May* 16.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Law of Victoria—Victorian Trusts Act, 1901, *s.* 3—*Construction—Breach of Trust—Trustees not entitled to be excused—Erroneous Advice of Solicitor—Trustee Company not gratuitous Trustees.*

Under the Victorian Trusts Act, 1901, s. 3 (corresponding with the English Act 59 & 60 Vict. c. 35), a trustee may be relieved from liability for breach of trust if he has acted honestly and reasonably, and ought fairly to be excused:—

Held, that, by the true construction of this section, a trustee does not entitle himself to relief by proving that he has acted reasonably and honestly. He must shew that under all the circumstances he ought fairly to be excused for his breach of trust.

J. F., being entitled to the whole of his deceased wife's proportion of a fund of which the appellants became trustees, assigned the same to the respondents. Under the erroneous advice of their solicitors, in accordance with an Act which was not passed till after the wife's death, the appellants paid two-thirds of the fund to the wife's children and one-third into court under the Act for relief of trustees without question by the respondents, who accepted the appellants' statement as to their rights without verification.

In a suit by the respondents to recover the said two-thirds:—

Held, (1.) that the payment thereof to the children was a breach of trust,

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and that it was no defence that it had been made upon erroneous advice of the solicitors.

Doyle v. *Blake*, (1804) 2 Sch. & Lef. 231; 9 R. R. 76, approved.

(2.) That the respondents having accepted and acted upon the appellants' statement as to their rights was no evidence of acquiescence.

(3.) That although the appellants had acted honestly and reasonably, they had shewn no title to be excused. They had made no attempt to replace the fund in whole or in part nor explained the reason for their abstention. They were not gratuitous trustees, and could not throw upon the respondents, who were not in fault, the loss of a fund which they had misapplied in the course of their business.

APPEAL from a decree of the Full Court (March 4, 1904), affirming a decree of à Beckett J. (Oct. 1, 1903) in favour of the respondents for 689*l.* and costs.

The respondent company are mortgagees of the interest of one John Fraser under the will of one Roderick McDonell, deceased, and their claim was, under the circumstances stated in the judgment of their Lordships, against the appellant company as the trustees of the estate of the said Roderick McDonell and as the administrators de bonis non of Mary Grace Fraser, the deceased wife of the said John Fraser, to recover 673*l.* 18*s.* 10*d.*, being the balance of the fund to which the respondents were entitled. The appellants in their defence stated the circumstances under which they paid over the fund in suit, being two-thirds of the fund the subject of the mortgage to the children of the said Mrs. Fraser in derogation of the rights of her husband's mortgagors, and relied on s. 3 of the Trusts Act, 1901.

à Beckett J. held that although the appellant company had acted honourably they were not entitled to be relieved under the provisions of the Trusts Act, 1901, solely on the ground that they had acted on legal advice. He further held that although the respondent company had not protested against the said payments being made they had not by any act of their own induced the payments now objected to, and that the mere omission to protest ought not to deprive them of their rights. The Full Court concurred in this judgment, and also laid stress on the fact that the appellants had made no attempt to recover any of the moneys which they had wrongfully paid away.

H. Terrell, K.C., and *V. Hawkins*, for the appellants, contended that the payment to the respondents of an insufficient share of the trust estate and the payment of the residue to the children of Mrs. Fraser were both of them made under a bonâ fide mistake of title in which the respondent company at the time concurred. The appellants had applied to their solicitors specifically to advise them what interest in the fund John Fraser had. The advice was brought to the notice of the respondents, whose advisers took the same view. In the negotiations which took place before the payments were made no question as to the right of the children to the two-thirds was raised. There was dispute as to the one-third which was eventually paid into court, but as to the two-thirds there was none. Both parties proceeded on the mistaken view that the Married Women's Property Act, 1884, applied, and overlooked the fact that Mrs. Fraser died before that Act was passed. The payments were made in 1889, and no suggestion of any error was made till 1902. It was submitted that the respondents had acquiesced therein, and had induced the appellants to believe that they admitted the claim of Mrs. Fraser's children. It had been found that the appellants had acted honestly and reasonably, and it was contended that they ought fairly to be excused under s. 3 of the Trusts Act, 1901, and relieved from personal liability.

With regard to breach of trust, the measure of a trustee's liability depends on his duty, and if he pays money honestly and reasonably in the due course of business there is no breach of trust: see *Speight* v. *Gaunt* (1); *Boulton* v. *Beard* (2); *Doyle* v. *Blake* (3); *Learoyd* v. *Whiteley* (4); *Evans* v. *Benyon* (5); *In re Hulkes* (6); *In re Stuart* (7); *In re Turner* (8); *Re Roberts* (9); *In re Grindey* (10); *Perrins* v. *Bellamy* (11), where Lindley M.R., quoting Selwyn L.J., says: "The main duty of a trustee is to commit *judicious* breaches of trust." [LORD

(1) (1883) 9 App. Cas. 1.
(2) (1853) 3 D. M. & G. 608.
(3) 2 Sch. & Lef. 231, 243; 9 R. R. 66.
(4) (1887) 12 App. Cas. 631.
(5) (1887) 37 Ch. D. 329.
(6) (1886) 33 Ch. D. 552.
(7) [1897] 2 Ch. 583.
(8) [1897] 1 Ch. 576.
(9) (1897) 76 L. T. 479, 483.
(10) [1898] 2 Ch. 593.
(11) [1899] 1 Ch. 797.

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LINDLEY. The words "main duty" are a mistake. They ought to be "great use."] *Waite* v. *Parkinson* (1); *Chapman* v. *Browne* (2); *In re Lord De Clifford's Estate* (3); *Re Smith, Smith* v. *Thompson.* (4) With regard to liability for the act of the solicitor, see *Bostock* v. *Floyer* (5), and to the solicitor's liability being limited to gross ignorance or gross negligence in the performance of his professional services, *Purves* v. *Landell.* (6)

Warmington, K.C., and *A. H. Jessel*, for the respondents, were not heard.

The judgment of their Lordships was delivered by

SIR FORD NORTH. This is an appeal from a judgment of the Full Court of the State of Victoria, affirming the judgment of à Beckett J., in the Supreme Court, holding the appellants liable for breach of trust in not having paid to the respondents their share in a trust estate.

The material facts are as follows:—

Roderick McDonell (who died in 1858) bequeathed his personal estate to trustees upon trust to get in the same, and pay one clear fourth part to his wife absolutely; and to invest the residue, and pay the annual income to his daughter Ann Howe during her life, and after her death to hold the principal in trust for her children who should attain twenty-one, or if daughters marry, in equal shares.

Six children of Ann Howe attained vested interests, and one of them, Mary Grace Howe, intermarried with John Fraser in July, 1872.

Mary Grace Fraser died in August, 1876, intestate, and administration to her estate was granted to her husband John Fraser, who by the law of the Colony as it then stood was absolutely entitled to the whole of her personal estate. She left two children only.

By an Act of the Colony which came into operation on December 13, 1884—the Married Women's Property Act, 1884

(1) (1901) 85 L. T. 456.
(2) [1902] 1 Ch. 785.
(3) [1900] 2 Ch. 707, 712 et seq.
(4) (1902) 86 L. T. 401.
(5) (1865) L. R. 1 Eq. 26.
(6) (1845) 12 Cl. & F. 91; 69 R. R. 46.

(48 Vict. No. 828), s. 25—it was provided that the estate, real and personal, as to which any married woman died intestate after the commencement of the Act should, after payment of duties and funeral, administration or testamentary expenses and debts, be distributable between her husband and her children or next of kin, in the like manner and proportions in which the estate, real and personal, as to which a married man died intestate was distributable between his widow and his children or next of kin.

By an indenture dated February 6, 1891, John Fraser assigned to the respondents all his share and interest in the personal estate of the testator McDonell, and in the estate of the said Mary Grace Fraser, whether as her husband, or administrator, or otherwise, by way of mortgage, for securing 650*l.*, with interest at 20 per cent. per annum.

John Fraser died intestate in June, 1894, without having paid any of the principal or interest due on the mortgage. No administration was taken out to him.

By an indenture dated July 8, 1895, the appellant company (hereinafter called the trustee company) and their managing director, Walter Madden, were, in exercise of a power contained in McDonell's will, appointed trustees of that will, and the investments representing the residue of his estate were transferred to the new trustees.

On December 18, 1897, Anne Howe, the tenant for life, died, and the trust estate became distributable.

The trustee company employed Messrs. Smith & Emmerton, a firm of high standing at Melbourne, as their solicitors in connection with McDonell's trust; and they in March, 1898, took out in the name of the trustee company letters of administration de bonis non to Mrs. Fraser, with full knowledge of the actual date of her death. Notwithstanding this the solicitors by some extraordinary slip advised the trustee company and their officers that the two children of Mrs. Fraser were entitled, in equal shares, to her share in McDonell's estate—as to two-thirds thereof in their own right, and as to one-third as beneficiaries under their father, assuming that he left no debts.

On June 13, 1898, Mr. Joy, then acting as liquidator of the

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respondents, wrote to the manager of the trustee company reminding them of the mortgage, and warning them against distributing any part of McDonell's trust estate, as the respondents were entitled to John Fraser's proportion.

On September 30, 1898, Mr. Macoboy, the secretary of the trustee company, who had charge of this estate under Mr. Madden, the managing director, and who was in personal communication with the solicitors on the subject, had an interview with Joy with respect to the assignment; and he states that he informed Joy that his company would get one-third and the Frasers two-thirds; and that Joy raised no question as to this. The respondents seem to have accepted this statement as to their rights without verification, though a reference to their mortgage would have shewn the date of Mrs. Fraser's death.

Questions were raised by John Fraser's children as to the validity of his mortgage, and what, if anything, was due upon it; and, in consequence, one-third of Mrs. Fraser's share was, under the Colonial Act for the relief of trustees, paid into court by the trustee company in March and August, 1899. The other two-thirds were, about August, 1899, divided between her two children. It does not appear how the money paid into court was ultimately dealt with.

It is shewn by the evidence of Mr. Macoboy that the solicitors of the trustee company did, at a subsequent date, discover and inform that company that they had made a mistake in advising them that J. Fraser was entitled to one-third only; but no information as to this was given to the respondents. They seem, however, to have subsequently discovered the mistake for themselves, and on December 30, 1902, their solicitors wrote to the trust company that the respondent company, as Fraser's assignee, was entitled to the whole of his late wife's share, or so much thereof as would satisfy their claim, and asked for a statement of Mrs. Fraser's estate; to which, on the following day, Mr. Madden made the disingenuous answer that the money was paid into court by the trust company in 1899. The respondents' solicitors, however, insisted upon their claim to the whole of the share in the trust funds

to which Mrs. Fraser was entitled; and not having received any satisfactory reply, the respondents, on March 11, 1903, issued the writ in this action to recover the amount improperly paid by the trustee company to her children, and obtained judgment in their favour for 673*l.* 18*s.* 10*d.* and interest. This was affirmed on appeal, and the present is an appeal from those decisions.

The appellants' counsel rested their case upon three grounds:—

1. That the trust company had paid the moneys to Mrs. Fraser's children upon the advice of competent legal advisers, and, therefore, there was no breach of trust;
2. That the respondents were estopped by their conduct from disputing the validity of the payment; and
3. That the trust company were protected by s. 3 of the Trusts Act, 1901.

With respect to the first point, it is clear beyond all question that John Fraser was entitled to the whole of his wife's share in the trust estate, and not to one-third only; and that the payment of two-thirds to Mrs. Fraser's children instead of to the respondents was a breach of trust. The fact that such payment was made through the bad advice of the solicitors of the trust company is no defence.

In *Doyle* v. *Blake* (1) Lord Redesdale said: "I have no doubt that they" (the executors) "meant to act fairly and honestly, but they were misadvised; and the Court must proceed, not upon the improper advice under which an executor may have acted, but upon the acts he has done. If, under the best advice he could procure, he acts wrongly, it is his misfortune; but public policy requires that he should be the person to suffer." And there are many similar decisions in the books.

The appellants relied on the case of *Speight* v. *Gaunt* (2), in which a trustee employed a broker to purchase certain securities for a trust. The broker said that he had done so, and produced a bought-note and asked for the money to complete, as next day was pay-day, and the trustee gave him the necessary

(1) 2 Sch. & Lef. 231, at p. 243. (2) 9 App. Cas. 1.

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cheques, which the broker misapplied. In a suit to make the trustee liable, it was held that the payment to the broker was made in the usual and regular course of business, and that the trustee was not liable; in other words, there was not any breach of trust. The present is a very different case.

The second point raised for the appellants was that the respondents' conduct induced them to believe that they admitted the title of Mrs. Fraser's children to the two-thirds, and that they acquiesced in and assented to the payment to them. Unfortunately for the appellants, there are no facts upon which such an argument can be based. There is not a shred of evidence to shew that the respondents were consulted about, or approved of, or assented to, or even were aware of, such payment being made. It is the common case of all parties that at that time every one believed that John Fraser, and the respondents through him, were interested in one-third only, and that the application of the rest of the fund was a matter in which the respondents had no concern. Any request to them to concur in the payment of the two-thirds to the children would probably have led to an investigation of the facts, and resulted in the institution of this action some years before 1903. It is true that the respondents did not ask for more than one-third; but they had been informed by the trust company that this was all to which they were entitled, and the trust company cannot complain that the respondents accepted and acted on that statement. They did not discover the error till long afterwards. There is no evidence that they in any way misled the trust company; on the contrary, the trust company misled them.

The third point raised on the appellants' behalf was that, even if there was a breach of trust, they should be relieved therefrom by virtue of s. 3 of the Trusts Act, 1901, which corresponds with s. 3 of the English Act, 59 & 60 Vict. c. 35. That section is as follows: "If it appears to the Supreme Court that a trustee is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be

excused for the breach of trust, and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same." The Courts in the Colony have found that the appellants acted honestly and reasonably, and their Lordships are prepared to deal with the case upon that footing. Mr. Terrell contended that these two things being established, the right to relief followed as a matter of course; but that is clearly not the construction of the Act. Unless both are proved the Court cannot help the trustees; but if both are made out, there is then a case for the Court to consider whether the trustee ought fairly to be excused for the breach, looking at all the circumstances. It is a very material circumstance that the appellants are a limited joint stock company, formed for the purpose of earning profits for their shareholders; part of their business is to act as trustees and executors; and they are paid for their services in so acting by a commission which the law of the Colony authorizes them to retain out of trust funds administered by them, in addition to their costs. What they now ask the Court to do is to allow them to retain a sum of money to which the respondents' title is clear, in order thereby to relieve the trust company from a loss they have incurred in the course of their business by reason of their having paid a like sum to wrong parties. The position of a joint stock company which undertakes to perform for reward services it can only perform through its agents, and which has been misled by those agents to misapply a fund under its charge, is widely different from that of a private person acting as gratuitous trustee. And without saying that the remedial provisions of the section should never be applied to a trustee in the position of the appellants, their Lordships think it is a circumstance to be taken into account, and they do not find here any fair excuse for the breach of trust, or any reason why the respondents, who have committed no fault, should lose their money to relieve the appellants, who have done a wrong and have denied the respondents' title. And that is not quite all. If trustees do unfortunately lose part of a trust fund by a breach of trust, the

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least that can be expected of them is that they should use their best endeavours to recover the fund, or so much thereof as is practicable, for their cestui que trusts. In the present case there seems to be some ground for thinking that other proceedings were open to the trust company by which any loss to them might have been averted, at any rate to some extent; but it does not appear that the trust company have taken any such steps, or made any attempt whatever to replace the fund or relieve the respondents from loss; nor have they condescended to give the Court any explanation or reason why they have abstained from doing so. It may be that the solicitors would be willing or might be compelled to make good the loss, if the trust company should find they cannot obtain relief elsewhere. The Courts in the Colony held that under these circumstances the appellants had not made out any case for relief under the Act; and their Lordships agree with them.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the costs.

Solicitor for appellants: *G. M. Light.*
Solicitors for respondents: *Hicks, Arnold & Mozley.*

[PRIVY COUNCIL.]

PONNAMMA . . . . . PLAINTIFF;

AND

ARUMOGAM AND OTHERS . . . . . DEFENDANTS.

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March 2, 3; May 17.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Law of Ceylon—Civil Procedure Code, s. 547—Suit for Partition of Intestate's Estate—Administrator not a Party.

In a suit brought in 1898 for partition, or alternatively for a sale of certain parts of an intestate's estate, it appeared that the intestate had died in 1884, that no letters of administration had been taken out, that the widow and son had made a division of the immovable estate between themselves and the other heirs and executed certain notarial deeds of gift for the purpose of effecting such division, and various dealings with their respective shares had been made by the allottees:—

Held, that the Supreme Court's decree of dismissal of the suit was right.

By s. 547 of the Civil Procedure Code, which was the law in force when the action was commenced, it was not maintainable in the absence of any administrator on the record.

The action, though in form for partition, was in substance for the recovery of property within the meaning of that section.

No partition could be effected by the Court without a complete administration of the whole of the intestate's estate, which would include an account of the payment of his debts, and of the dealings of the allottees with their respective shares so as to adjust their respective rights.

APPEAL by special leave in formâ pauperis (see [1902] A. C. 561) from a decree of the above Court (Jan. 4, 1900) setting aside a decree of the District Court of Badulla (Oct. 16, 1899) and dismissing the appellant's action with costs.

The District Judge, under the circumstances stated in the judgment of their Lordships, decided that the lands in suit must be redistributed in certain specified proportions, and decreed partition accordingly.

The Supreme Court reversed this decree on the following grounds:—

Lawrie J. said: "There seems good evidence that the estate

* *Present:* LORD DAVEY, LORD ROBERTSON, SIR ARTHUR WILSON, and SIR JOHN BONSER.

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of the deceased Sinnatambi soon after his death was divided by his widow and his eldest son in the manner directed by him on his death-bed. Notarial deeds of gift were executed by the widow and the eldest son to the other members of the family. There is good reason to hold that the division was a fair one; part of the property has since then deteriorated in value, in consequence of the entire failure of coffee; part of the property (the boutiques) have perhaps improved in value, or at least have not deteriorated to the same degree as the land formerly in coffee.

"That which is now the most valuable part of the property (the boutiques) has practically not been possessed by the son or by his mother. These have been handed over to a lessee for twelve years as a means of paying off the debts due by Sinnatambi at the time of his death. It would not be just to the creditors nor to the widow to disturb this arrangement. The widow, who was by law entitled to one-half of the estate, has given up all her rights mainly to enable the debts to be paid. The plaintiff and some of her sisters were certainly under twenty-one years of age when their father died. They married when they were still very young, and the deeds in their favour, executed in 1884, were not challenged until 1898."

Withers J. said: "These acts were possibly more equitable than legal at the time, but time has confirmed them, and it would be wrong in every sense of the word to disturb the division of the property as effected by them, to say nothing of the dispositions and incumbrances which have supervened."

R. W. Lee, *F. H. M. Corbet*, and *A. S. V. Jayewardene*, for the appellant, the first plaintiff (the second plaintiff being her husband), contended that the widow and son had no legal right to intermeddle with the deceased's estate, and that the deeds by which they purported to distribute it were therefore invalid. The consent of parties to this distribution was not proved, and the appellant was a minor at the time. Her right to a share ab intestato in her deceased father's estate has not been displaced by either agreement or acquiescence, and the distribution has been shewn to be inequitable. The estate

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ought to have been duly administered. In 1884, no doubt, the date of Sinnatambi's death, the law of Ceylon did not fix any limit of value above which it was necessary to take out letters of administration to the estate of a deceased intestate. It was, however, in practice obligatory to do so except in the case of small estates—*Fernando* v. *Fernando* (1)—which as a rule did not include estates above Rs.1000 in value. But see *Mohamado Cassim* v. *Cassim Marikar*. (2) The widow and son were, therefore, not justified in acting on their own authority. Reference was made to the Civil Procedure Code of 1889, ss. 545, 547, as to the necessity of having an administrator on the record in the present suit. Reference was also made to *Gunaratne* v. *Hamine* (3); *Fernando* v. *Dochohi*. (4) The Code is not retrospective so as to affect pending actions: see Ordinance 12 of 1904, ss. 2, 3. Besides, this was a partition proceeding and not within s. 547.

The respondents did not appear.

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The judgment of their Lordships was delivered by

LORD DAVEY. In the year 1884 one Sinnatambi, a native of Ceylon, being possessed of property of considerable value, consisting chiefly of lands and houses, died intestate. His heirs, according to the law of Ceylon, were his widow, the sixth respondent, who was entitled to one half-share, a son and five daughters, of whom the appellant is one, and a grandchild, daughter of a deceased daughter, who were entitled to the other half-share in equal shares.

No letters of administration were taken out, or have since been taken out to the intestate's estate. But the widow and son took upon themselves to make a division, in pursuance, it is said, of the intestate's verbal directions, of the immovable property between themselves and the other heirs, and executed certain notarial deeds of gift for the purpose of effecting such division. The appellant apparently had possession of the lands allotted to her, and dealt with part thereof by letting it out for the cultivation of kurakkan. One of the daughters, the

(1) (1900) 4 Ceylon N. L. R. 201.
(2) (1892) 2 Ceylon L. R. 75.
(3) (1903) 7 Ceylon N. L. R. 299.
(4) (1901) 5 Ceylon N. L. R. 15.

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respondent Mariyayi, sold the property allotted to her and received the purchase-money. The son paid debts of the intestate and mortgaged certain shops retained by him for the purpose, and also made a gift of lands of his own to provide a portion for the grandchild. And there seem to have been other dealings by the parties with the lands allotted to them, the particulars of which are not very clearly stated. What became of the movable property does not appear. Probably it was of small amount. There is not sufficient on the record to shew whether the division, though irregularly made, was or was not a fair one.

On May 4, 1898, the appellant and her husband commenced the present action for partition, or alternatively a sale of certain parts of the intestate's immovable property (not including the lands which had been sold by Mariyayi). In their plaint they alleged that since the death of their father the family had been possessing and holding the said lands undividedly and in common. The principal defence by those defendants who opposed the plaintiffs was that they had acquired a title to the lands allotted to them by prescription.

The judge of the District Court held that no single heir had proved a prescriptive title against any of the other heirs in respect of any of the lands which formed the subject of the action. And by his decree dated October 16, 1899, it was ordered that the lands in suit be partitioned, allotting to the parties their respective shares.

This decree was reversed on appeal in the Supreme Court, and by the decree of that Court dated January 4, 1900 (now under appeal), the action was dismissed with costs. The reasons of the learned judges are not very clearly stated, but they appear to have thought that the division was a fair one, and that the widow and son had honestly administered the estate in accordance with the intestate's instructions, and that time had confirmed their acts. "It would be wrong," said Withers J., "in every sense of the word to disturb the division of the property as effected by them, to say nothing of the dispositions and incumbrances which have supervened."

Their Lordships agree with the judgment of the Supreme

Court, though not quite for the same reasons. The first objection to the action is the absence of any administrator on the record. This is not merely a technical or a fiscal objection, but one of substance. The Charter of Justice of 1833 has been construed in the Ceylon Courts as having introduced into the island the English law of executors and administrators, with this variation—that it was made applicable to the immovable property as well as the movable property of a deceased person. Rules were drawn up in the Supreme Court in 1833 for carrying into effect the provisions of the Charter of that year. But the procedure being a graft upon the Roman-Dutch law, and being new to the people, an exception was allowed to be made in favour of small estates. By the Civil Procedure Code of 1889 that practice received legislative sanction. By s. 545 it was made obligatory on the Court to appoint an administrator where the estate exceeds Rs.1000 in value, and by s. 547 it was enacted that no action should be maintainable for the recovery of any property included in the estate of a deceased person where such estate exceeds in value Rs.1000, unless grant of probate or letters of administration should have been first issued to some person as executor or administrator of the deceased. It has been said by learned judges in the Supreme Court of Ceylon that before the enactment of the Civil Procedure Code the same rule prevailed, and that the only effect of s. 547 was to determine what was a small estate: see the judgment of Bonser C.J. in *Fernando* v. *Fernando* (1), quoting Clarence A.C.J. in an earlier case, and that of Layard C.J. and Wendt J. in *Gunaratne* v. *Hamine*. (2) In the latter case Wendt J. said: "It is plain that if parties were enabled by agreement to waive the necessity for administration, the intention of the Legislature would be frustrated. Hence it is that, whenever it appears in the course of a case which a Court is trying that administration is necessary, it becomes the duty of that Court to see that the provisions of s. 547 are complied with before the litigation proceeds any further."

Even if their Lordships thought that the construction given

(1) 4 Ceylon N. L. R. 201, at p. 206. (2) 7 Ceylon N. L. R. 299.

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to the Charter of Justice and the Code of Civil Procedure by the Colonial Court was doubtful, they would hesitate to overrule a settled and uniform course of decision on a question of this kind. But they are of opinion that the learned judges have taken a correct view, and their decisions ought to be followed. This appeal must therefore be decided on that footing, and not according to the undiluted principles or rules of the Roman-Dutch law.

It was, however, contended that s. 547 was not applicable to the present case on two grounds. The first ground was that, by Ordinance No. 12 of 1904, s. 2, a proviso was added to s. 547 to the effect that no action for the recovery of, or involving proof of title to, any property movable or immovable included in the estate of any person who died intestate before the commencement of the Ordinance of 1889 should be defeated by reason only that letters of administration to the estate of such person have not been issued. Secondly, it was said that this action is not for the recovery of any property within the meaning of s. 547.

To the first argument it is sufficient answer to point out that the judgment of the Supreme Court was given more than four years before the new Ordinance was passed, and their Lordships have only to say whether that judgment was right when it was given. It is unnecessary, therefore, to discuss the question whether any intention is sufficiently shewn to take this case out of the well-known rule on the construction of statutes, that the rights of the parties must be decided according to the law as it existed when the action was commenced.

On the second point their Lordships are of opinion that this action, though in form an action for partition only, is for the recovery of property. The appellant is seeking to recover her share as one of her father's heirs in the property which has been irregularly alienated in favour of the other heirs, and is in their possession, or has been dealt with by them as owners thereof.

These considerations are sufficient to dispose of this appeal, but their Lordships think that the appeal fails on a broader

ground. They are of opinion that the intestate's estate was not in a condition for partition. It is not the fact, as alleged in the plaint, that since the death of the intestate his heirs have been holding and possessing the lands in question undividedly and in common. Before any partition could take place the plaintiffs would require to recreate the inheritance. The irregularly alienated portions of it would have to be brought back into the corpus, and the rights of the parties inter se adjusted; in other words, the estate of the intestate would have to be administered before the beneficial rights and interests of the heirs could be ascertained. A perusal of the decree made by the judge of the District Court is sufficient to show that justice could not be effectuated by it. All that the Commissioner could do under the decree would be to divide the lands mentioned in it between the plaintiffs and several defendants in certain shares. It does not even purport to be a complete division of the estate. The lands proposed to be partitioned do not include the land sold by Mariyayi, and no account is taken of the purchase-money received by her, or of the debts of the intestate said to have been paid by the son, or the lands conveyed by him to the grandchild, or of the mesne profits, or of the movable property. And to make it worse, counsel for the appellant proposed to omit from the partition the item (*e*), which is held on lease only. It is impossible in fact to say, on the materials before their Lordships, whether the appellant is entitled to the share which she claims in the lands sought to be partitioned. The plaint asks alternatively for a sale; but, on the theory that the estate remains undivided, no sale could be made except through an administrator.

Since the hearing of this appeal their Lordships have permitted the counsel for the appellant to lay before them a report of the case of *Silva* v. *Swaris* (1), recently decided by the Supreme Court of Ceylon. As the respondents were not represented on the hearing, this might be done without setting the appeal down again for further hearing. The consideration of that case has not led their Lordships to alter the opinion they had formed after the hearing. It was there decided that s. 2

(1) (1904) 1 Balasingham's Rep. 61.

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of Ordinance No. 12 of 1904 applied to pending actions, and that an action in which final judgment had been given, from which judgment there was a pending appeal, was for this purpose a pending action, and the Supreme Court had power to give the plaintiffs appealing the benefit of the Ordinance which had been passed in the interval between the judgment in the Court of first instance and the hearing of the appeal.

It is not necessary to consider whether the case was rightly decided, as their Lordships do not think that either the case itself, or the cases referred to by the learned judges in their judgment, have any application to this appeal to the King in Council. The case of *Salt* v. *Cooper* (1) seems merely to have decided that a cause in which judgment has been given, provided that judgment has not been satisfied, is still pending within the meaning of the rule relating to execution of judgments, which seems a little obvious. *Quilter* v. *Mapleson* (2) was decided on a rule which prescribes that "all appeals to the Court of Appeal shall be by way of rehearing." And Jessel M.R. pointed out (3) that on an appeal strictly so called such a judgment can only be given as ought to have been given at the original hearing, but on a rehearing such a judgment may be given as ought to be given if the case came at that time before the Court of first instance. In like manner the Supreme Court in *Silva* v. *Swaris* (4) relied on the terms defining their appellate jurisdiction, which they thought, rightly or wrongly, went beyond the correction of errors made by the Courts below. Without limiting the extent of His Majesty's prerogative, their Lordships can safely say that it is not the practice of this Board to entertain any other appeal than one strictly so called, in which the question is whether the order of the Court from which the appeal is brought was right on the materials which that Court had before it. The Board may, however, think that the Court below had not sufficient materials for its judgment, or improperly omitted to receive or to require further evidence, or to try some issue, in which case it may remit the case for further hearing.

(1) (1880) 16 Ch. D. 544.
(2) (1882) 9 Q. B. D. 672.
(3) 9 Q. B. D. at p. 676.
(4) 1 Balasingham's Rep 61.

Their Lordships must, however, remind the learned counsel of what they have already said, that in this case the objection of want of administration is one of substance, and that the appellant's case does not fail by reason only that letters of administration to the intestate's estate have not been granted.

For these reasons their Lordships will humbly advise His Majesty that the appeal ought to be dismissed. As the appellant is appealing in formâ pauperis, and the respondents do not appear, there will be no costs of the appeal.

Solicitor for appellant: *J. J. Freeman.*

[HOUSE OF LORDS.]

H. L. (E.) 1905 July 3.

LORD MAYOR, &c., OF SHEFFIELD . APPELLANTS;

AND

BARCLAY AND OTHERS . . . . . RESPONDENTS.

Company—Forged Transfer of Stock—Innocent Presentment for Registration—Indemnity—Implied Contract to indemnify.

A banker in good faith sent to a corporation a transfer of corporation stock which purported to be executed by T. and H., the two registered holders of the stock, with a request to the corporation to register the stock in the name of the banker. The corporation in good faith acted upon this request and granted a fresh certificate to the banker who transferred the stock to third parties, and they were registered as holders. Afterwards it was discovered that T. had forged H.'s signature, and H. recovered against the corporation judgment whereby they were compelled to buy equivalent stock and register it in H.'s name, and to pay him the missing dividends with interest:—

Held, that both parties having acted bonâ fide and without negligence the banker was bound to indemnify the corporation against the liability to H., upon an implied contract that the transfer was genuine.

The decision of the Court of Appeal, [1903] 2 K.B. 580, reversed, and the decision of Lord Alverstone C.J., [1903] 1 K. B. 1, restored.

THE circumstances under which this appeal arose are stated concisely in Lord Davey's judgment, and at length in the reports below. (1)

1904. Dec. 1, 2, 8. *Danckwerts, K.C.*, and *Eldon Bankes, K.C.* (*H. T. Waddy* with them), for the appellants. Where a transfer which on the face of it was perfectly regular was presented to the appellants, they had no option but to register it. It was a statutory duty. There was no duty on the part of the corporation to know the signatures of the parties to the instrument. A bank is bound to recognise the signature of its own customer; but there is no obligation on the part of a corporate body to verify the writing of all possible transferors and transferees. The stock was registered at the request of the respondents. A long series of authorities establishes that

(1) [1903] 1 K. B. 1; [1903] 2 K. B. 580.

such a request implies an indemnity from the consequences of acceding to the request. The first case was *Fletcher* v. *Harcot* (1)—a case of illegal imprisonment. That case was approved in *Betts* v. *Gibbins* (2), and in *Toplis* v. *Grane* (3) Tindal C.J. expressed the law to be that where an act has been done by the plaintiff under the express direction of the defendant which injures third parties, the plaintiff is entitled to an indemnity. *Dugdale* v. *Lovering* (4), where the cases are cited, is to this effect. *Humphrys* v. *Pratt* (5) in this House gave a right of indemnity to the sheriff for the wrongful seizure of goods. *Richardson* v. *Williamson* (6) and *Firbank's Executors* v. *Humphreys* (7) were cases in which directors were held personally liable to indemnify for loss occasioned by their implied representations. In *Balkis Consolidated Co.* v. *Tomkinson* (8) a company was estopped from denying the ownership of shares for which it had itself issued the certificates. There Lord Field expressly approved the decision in *Simm* v. *Anglo-American Telegraph Co.* (9) that there is no duty upon a company to inquire of a registered holder whether the signature is genuine. *Simm's Case* (9) is precisely parallel with the present. Persons demanded to be registered as transferees and the company assented, but there was no estoppel against the company from denying the validity of the transfer: see per Bramwell L.J. (10) Full effect to the doctrine of implied representation or warranty was given in *Starkey* v. *Bank of England.* (11) The right is correlative with a duty incumbent on the person who seeks to enforce the right. This distinguishes the present appeal from *Collins* v. *Evans* (12) and *Childers* v. *Wooler* (13), cases of wrongful execution by the sheriff, who was innocently misled by the defendants, but had to act on his own responsibility. It was

(1) (20 Jac. 1) Hutton's Rep. 55.
(2) (1834) 2 Ad. & E. 57, 75; 41 R. R. 381.
(3) (1839) 5 Bing. N. C. 636, 650; 50 R. R. 814.
(4) (1875) L. R. 10 C. P. 196.
(5) (1831) 5 Bli. (N.S.) 154; 35 R. R. 41.
(6) (1871) L. R. 6 Q. B. 276.
(7) (1886) 18 Q. B. D. 54.
(8) [1893] A. C. 396.
(9) (1879) 5 Q. B. D. 188.
(10) 5 Q. B. D. at pp. 202, 203.
(11) [1903] A. C. 114, 116, 118.
(12) (1844) 5 Q. B. 804, 828–30; 64 R. R. 647.
(13) (1860) 2 E. & E. 287.

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held that the sheriff was not entitled to damages against the defendants. So in *Low* v. *Bouverie* (1), where it was held to be no duty of a trustee to answer the questions of a stranger with respect to the trust funds: see per Bowen L.J. (2)

[They also referred to *Mellor* v. *Knox*. (3)]

The appellants are not barred by the Statute of Limitations, because they could not bring their action until the forgery was established.

Haldane, K.C., and *F. R. Y. Radcliffe, K.C.*, for the respondents. The respondents gave no warranty: they merely requested the corporation to discharge a statutory duty. No right to indemnity from damage accruing from the inaccuracy of statements honestly made has ever been established, though precisely similar events to those here must have happened many times. There was no relation of principal and agent or transferor and transferee such as existed in *Starkey* v. *Bank of England*. (4) *Simm* v. *Anglo-American Telegraph Co*. (5) is the only case at all like the present and is distinguishable, as it was held that the transferee under the forged transfer had not relied on any act of the company and had equal means of knowledge of the true facts: see *Collins* v. *Evans*. (6) Here the corporation alone had any means of knowledge: they kept the register not only for the benefit of transferees, but for public purposes generally. They owe a duty to persons seeking to be registered; the respondents owed none to them beyond the production of the instrument. The law as to indemnity, express or implied, is stated by Bowen L.J. in *Birmingham and District Land Co.* v. *London and North Western Ry. Co*. (7) The right arises "by express contract if it is given in terms by the contract between the two parties" —which is not the case here: "by implied contract if the true inference to be drawn from the facts is that the parties intended such indemnity, even if they did not express themselves to that effect, or if there is a state of circumstances to

(1) [1891] 3 Ch. 82.
(2) [1891] 3 Ch. at p. 105.
(3) (1838) 4 Bing. N. C. 574.
(4) [1903] A. C. 114.
(5) 5 Q. B. D. 188.
(6) 5 Q. B. 804; 64 R. R. 647.
(7) (1886) 34 Ch. D. 261, 274.

which the law attaches a legal or equitable duty to indemnify." These conditions are not fulfilled in the present case. As to the character and effect of registration, see Blackburn J. in *In re Bahia and San Francisco Ry. Co.* (1): "If they" (the company) "have been deceived and the statement is not perfectly true, they may not be guilty of negligence, but the company and no one else have power to inquire into the matter: and it was the intention of the Legislature that these certificates should be documents on which buyers might safely act." This was followed by *Hart* v. *Frontino, &c., Co.* (2), per Bramwell B. The same principles were enforced in *Balkis Consolidated Co.* v. *Tomlinson* (3), per Lord Macnaghten's and Lord Field's judgments. See also *In re Ottos Kopje Diamond Mines* (4); *Dixon* v. *Kennaway & Co.* (5) If the appellants are right a trustee would be liable for ever if he forwarded a forged transfer to be registered: *Low* v. *Bouverie.* (6)

Bankes, K.C., in reply. It is not denied that it is the corporation's duty to keep a correct register and issue correct certificates. In discharge of that duty the money was paid to Honnywill. But there can be no duty to register a forged transfer. The request made by the respondents for the certificate was the foundation of the action. The corporation gave no warranty against forgery, and all the cases of warranty relied upon by the respondents were warranty of authority and are inapplicable.

The House took time for consideration.

1905. July 3. EARL OF HALSBURY L.C. My Lords, two persons, Timbrell and Honnywill, were joint owners of corporation stock created under a local Act of Parliament. Timbrell in fraud of Honnywill forged a transfer of the stock, and borrowed money on the security of the stock which the transfer was supposed to have transferred. A bank which lent the money sent the transfer to the proper officer of the corporation, and demanded, as they were entitled to do if the transfer was

(1) (1868) L. R. 3 Q. B. 584, 596.
(2) (1870) L. R. 5 Ex. 111.
(3) [1893] A. C. 396.
(4) [1893] 1 Ch. 618.
(5) [1900] 1 Ch. 833.
(6) [1891] 3 Ch. 82.

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a genuine one, that they should be registered as holders of the stock. The corporation acted upon their demand; they transferred the stock into the names of the bank, and the bank in ordinary course transferred it to holders for value. The corporation also in ordinary course issued certificates, and the holders of these certificates were able to establish their title against the corporation, who were estopped from denying that those whom they had registered were the stockholders entitled.

Honnywill, after the death of Timbrell, discovered the forgery that had been committed, and compelled the corporation to restore the stock, and the question in the cause is whether the corporation has any remedy against the bank who caused them to act upon a forged transfer, and so render themselves liable to the considerable loss which they have sustained.

Now, apart from any decision upon the question (it being taken for granted that all the parties were honest), I should have thought that the bank were clearly liable. They have a private bargain with a customer. Upon his assurance they take a document from him as a security for a loan, which they assume to be genuine. I do not suggest that there was any negligence—perhaps business could not go on if people were suspecting forgery in every transaction—but their position was obviously very different from that of the corporation. The corporation is simply ministerial in registering a valid transfer and issuing fresh certificates. They cannot refuse to register, and though for their own sake they will not and ought not to register or to issue certificates to a person who is not really the holder of the stock, yet they have no machinery, and they cannot inquire into the transaction out of which the transfer arises. The bank, on the other hand, is at liberty to lend their money or not. They can make any amount of inquiries they like. If they find that an intended borrower has a co-trustee, they may ask him or the co-trustee himself whether the co-trustee is a party to the loan, and a simple question to the co-trustee would have prevented the fraud. They take the risk of the transaction and lend the money. The security given happens to be in a form that requires registration to make it available, and the bank "demand"—as, if genuine

transfers are brought, they are entitled to do—that the stock shall be registered in their name or that of their nominees, and are also entitled to have fresh certificates issued to themselves or nominees. This was done, and the corporation by acting on this "demand" have incurred a considerable loss.

As I have said, I think if it were res integra I should think the bank were liable; but I do not think it is res integra, but is covered by authority.

In *Dugdale* v. *Lovering* (1) Mr. Cave, arguing for the plaintiff, put the position thus: "It is a general principle of law when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done." This though only the argument of counsel was adopted and acted upon by the Court, and I believe it accurately expresses the law. Qualifications have been constantly introduced into the discussion which I think have led to some confusion; they are not really qualifications of the principle here enunciated at all, but the expression of principles which would render the application of the principle in question erroneous. One qualification is that there is no right of contribution between tortfeasors; and the other is to distinguish the right insisted upon from the ordinary remedy in damages against a person who has caused injury by intentional falsehood.

Neither of these questions has any relation to what is here in debate. The principle insisted upon by Mr. Cave in his argument quoted above has been undoubtedly sanctioned as part of the law by several old decisions, and I think the principle as enunciated is well established.

With respect to the case of the sheriff quoted in the Court of Appeal, I think it has been overlooked that the sheriff was executing a genuine writ, and the information he received was given to him to aid him in the execution of the office which by law he was bound to execute, and the information (for it was no more) was given to him in good faith; but can any one

(1) L. R. 10 C. P. 196.

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suppose that if any one brought a forged writ, and called upon the sheriff to execute it, that such person would not be liable to indemnify the sheriff? I cannot think there would be any doubt on that subject; but the genuineness or otherwise of the document that the corporation were called upon to give effect to made the whole difference, and I think both upon principle and authority the corporation are entitled to recover, and I move your Lordships accordingly.

LORD DAVEY. My Lords, the appellants are suing the respondents upon an implied contract to indemnify them against the liability which has been incurred by them in these circumstances. On April 11, 1893, the respondents, Barclay & Co., Limited, forwarded to the appellants a transfer of Sheffield Corporation Stock purporting to be executed by two persons named Timbrell and Honnywill, who were the registered holders of the stock, in favour of the respondent Barclay, with a request to the appellants to register the name of the last-named respondent and forward new certificates in due course. The appellants acted upon this request, and granted a new certificate to the respondent Barclay, who afterwards transferred the stock for value to third parties. The names of Barclay's transferees were registered in due course, and it is admitted that they obtained a good title against the appellants. All parties believed that the signatures to the transfer from Timbrell and Honnywill were genuine, but, in fact, Honnywill's signature had been forged by Timbrell. It was not, however, until 1899, after Timbrell's death, that Honnywill discovered the fraud; and he thereupon brought an action against the present appellants for rectification of the register and other relief, and recovered judgment against the appellants under which they have incurred a large liability.

On these facts Lord Alverstone C.J., who tried the action, has held that the appellants are entitled to be indemnified by the respondents against the liability they have incurred; but his judgment has been reversed by the Court of Appeal, Vaughan Williams, Romer, and Stirling L.JJ. Before referring to the numerous authorities which have been cited, I will first state

the grounds upon which I have come to the conclusion that the Lord Chief Justice was right and his judgment should be restored.

Not much turns upon the particular provisions in the corporation's private Act of 1883 as to the transfer of their debenture stock, or the keeping of the register, or the issue of certificates of title. They for the most part follow the lines of the similar provisions in the Companies Clauses Act. I think that the appellants have a statutory duty to register all valid transfers, and on the demand of the transferee to issue to him a fresh certificate of title to the stock comprised therein. But, of course, it is a breach of their duty and a wrong to the existing holders of stock for the appellants to remove their names and register the stock in the name of the supposed transferee if the latter has, in fact, no title to require the appellants to do so. I am further of opinion that where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (it does not seem to me to matter which word you use), and without any default on his own part acts in a manner which is apparently legal but is, in fact, illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request, or could not with reasonable diligence have discovered it.

I think that this is the broad principle to be deduced from such cases as *Humphrys* v. *Pratt* (1), *Betts* v. *Gibbins* (2), *Toplis* v. *Grane* (3), and the other cases which have been cited. In *Humphrys* v. *Pratt* (1) the reasons for the judgment in this House are unfortunately not stated in the report; but in commenting on that case in *Collins* v. *Evans* (4)

(1) 5 Bli. (N.S.) 154; 35 R. R. 41.
(2) 2 Ad. & E. 57; 41 R. R. 381.
(3) 5 Bing. (N.C.) 636; 50 R. R. 814.
(4) 5 Q. B. 804, at p. 829; 64 R. R. 647.

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Tindal C.J. says: "The declaration states that the judgment creditor pointed out the goods and required the sheriff to take them. He made the sheriff his mandatory or agent for the purpose of taking the goods, and if the sheriff, acting innocently in obedience to that command, commits a trespass, there is no doubt, but he, as any other individual in that position, whether sheriff or not, may recover over against his master or principal the damages he has been obliged to pay in consequence of obeying such directions." In *Toplis* v. *Grane* (1) the same judge, after referring to the evidence in the case, says: "We think this evidence brings the case before us within the principle laid down by the Court of Queen's Bench in *Betts* v. *Gibbins* (2), that where an act has been done by the plaintiff under the express directions of the defendant which occasions an injury to third parties, yet, if such act is not apparently illegal in itself but is done honestly and bonâ fide in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof." In *Collins* v. *Evans* (3), on the other hand, the sheriff was intrusted with the execution of a writ of ca. sa. against one John Wright, and the defendant pointed out to him a person of the same name as the person liable, and the sheriff acted on the representation and incurred liability. It was held that the defendant was not liable to indemnify the sheriff because he had merely made an innocent representation to the sheriff but had not required the sheriff to act upon such representation, and had left him to his own discretion whether he would act upon it or not.

It has been said that the principle of these decisions only applies to cases between principal and agent, and employer and employee, and the language of Tindal C.J. in his comment on *Humphrys* v. *Pratt* (4) has been thought to give some colour to that suggestion. I am not, however, of that opinion, and the contrary was decided in *Dugdale* v. *Lovering*. (5) It may be that the language of Tindal C.J. was not so felicitous as

(1) 5 Bing. (N.C.) 636; 50 R. R. 814.
(2) 2 Ad. & E. 57; 41 R. R. 381.
(3) 5 Q. B. 804; 64 R. R. 647.
(4) 5 Bli. (N.S.) 154; 35 R. R. 41.
(5) L. R. 10 C. P. 196.

it usually was; but his meaning is plain that the liability to indemnify the sheriff arose from his having acted in supposed execution of his duty at the request and by the direction of the creditor. In some cases it is a question of fact whether the circumstances are such as to raise the implication of a contract for indemnity; but in cases like the one now before your Lordships, when a person is requested to exercise a statutory duty for the benefit of the person making the request, I think that the contract ought to be implied. It matters not to the corporation whether A. or B. is the holder of stock, but to the purchaser who has paid his purchase-money or the banker who has lent money on the security of the stock it is of vital interest. The Court of Appeal distinguished the sheriff's cases on the ground that the request was to execute his duty in a particular manner. In the cases in question that was so. But I think the argument hæret in cortice, and is neither logical nor maintainable. It is difficult to imagine a case where a person should innocently request the sheriff to execute a writ which, though apparently regular, is in fact fictitious or invalid. If such a case be possible, it would come within the exact words of Tindal C.J.; and I entertain no doubt that the person presenting the writ would be held liable to indemnify the sheriff. It does not seem to matter at what stage of the transaction the request to do an act which turns out to be outside the officer's duty is made. In the present case, as pointed out by Mr. Bankes, the appellants ran no real risk until they issued the new certificate on the demand of the respondents.

The judgment of the learned judges in the Court of Appeal seems to be based mainly on three grounds—(1.) the decision of Lord Lindley (then Lindley J.) in *Anglo-American Telegraph Co.* v. *Spurling* (1); (2.) that there was no consideration for the alleged contract of indemnity; (3.) that the contract, if any, to be implied from the circumstances was a warranty of their title by the transferees, and not a contract of indemnity.

The cases of *Simm* v. *Anglo-American Telegraph Co.* (1) and the *Anglo-American Telegraph Co.* v. *Spurling* (1) were an

(1) 5 Q. B. D. 188.

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action and cross-action which arose out of a forged transfer of some of the company's stock, and were heard together.

The first action was by the persons claiming under the forged transfer against the company for damages for wrongful removal of their names from the register on discovery of the fraud; and the cross-action was by the company against the persons who had brought in the forged transfer for registration for an indemnity. The learned judge decided the first action in favour of the plaintiffs. He also decided the cross-action against the company. With regard to the transferor, he said: "Supposing that he knows nothing wrong about it, are the company entitled to say to him, 'We assume from the fact that you bring this transfer to us that it is a genuine document'? I apprehend that they are not entitled to say so to him. They are only entitled to say to him, 'We assume that you come honestly to us and that you do not know that anything is amiss with regard to the transaction.'" The learned judge then stated his views as to the duties of the company as follows: "It appears to me that a duty is thrown on the company to look to their own register which involves of course the looking after the transfer of stock or shares standing in the names of persons on the register, and that duty the company owe to those who come with transfers, and I do not see any corresponding or conflicting duty on the part of the person who brings the transfer, except, of course, that of bringing what he believes to be an honest document. I think the true view is this, that there being no negligence in the sense of want of care on either side, but there being a duty on the part of the company to keep the register correct and themselves to look after the transfers between innocent parties, the loss must fall on the company." There was an appeal in both cases, and the decision in the first action was reversed, but counsel for the telegraph company did not proceed with the appeal in the cross-action, because, if they succeeded in the first appeal, the telegraph company had not suffered any damage.

My Lords, I am of opinion that the case of *Anglo-American Telegraph Co.* v. *Spurling* (1) was also wrongly decided by

(1) 5 Q. B. D. 188; and see per Bramwell L.J., p. 205.

Lindley J., and I respectfully dissent from both the propositions laid down by him and adopted by the Court of Appeal in the present case. I dissent from the proposition that a person who brings a transfer to the registering authority and requests him to register it makes no representation that it is a genuine document, and I am disposed to think (though it is not necessary to decide it in the present case) that he not only affirms it is genuine, but warrants that it is so. I think that this is the result of the decision in *Oliver* v. *Bank of England* (1), affirmed in this House under the name of *Starkey* v. *Bank of England*. (2) It may be argued with some force that for this purpose no solid distinction can be made between the power of attorney through which the transfer of Consols is effected and the deed of transfer in the present case. Each of these instruments, it may be said, is put forward as evidence of the authority with which the person making the application professes to be clothed to request the removal of the stockholder's name and the substitution of another name in his place. But, however this may be, it is enough for the decision of this appeal to say that the deed of transfer was put forward as a genuine document, and the appellants were invited to act upon it as such.

I am also of opinion that the authority keeping a stock register has no duty of keeping the register correct which they owe to those who come with transfers. Their only duty (if that be the proper expression) is one which they owe to the stockholders who are on the register. This point was decided by all the learned judges who took part in the decision of the first case of *Simm* v. *Anglo-American Telegraph Co.* (3) I will content myself with quoting the language of Cotton L.J. (4): "The duty of the company is not to accept a forged transfer, and no duty to make inquiries exists towards the person bringing the transfer. It is merely an obligation upon the company to take care that they do not get into difficulties in consequence of their accepting a forged transfer, and it may be

(1) [1902] 1 Ch. 610.
(2) [1903] A. C. 114.
(3) 5 Q. B. D. 188.
(4) 5 Q. B. D. p. 214; and see per Bramwell L.J. p. 203, and Brett L.J. p. 209.

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said to be an obligation towards the stockholder not to take the stock out of his name unless he has executed a transfer; but it is only a duty in this sense, that unless the company act upon a genuine transfer they may be liable to the real stockholder." True it is that the appellants, following what is now the usual practice, gave notice of the transfer which had been brought in to the persons named as transferors, but they had no duty to do so, and it was done merely for their own protection. Experience in these cases shews, however, that it is a very poor protection.

Stirling L.J. held that the mere performance of a duty imposed by law upon any one holding a definite legal position does not constitute a consideration sufficient to support a promise to him by the person to whom the duty is owed. But with great respect to that very careful judge, he overlooked that this very point was involved in the decision of the case of *Oliver* v. *Bank of England*. (1) Vaughan Williams L.J. quoted and commented upon the passage from the judgment of Willes J. in *Collen* v. *Wright* (2), where he says: "The fact of entering into the transaction with the professed agent as such is good consideration for the promise." And it did not occur either to the learned counsel, who argued the case with great pertinacity, or to any of the learned judges in the Court of Appeal or the noble Lords in this House, to question that the acting by the Bank of England on the demand of the supposed attorney was a good consideration for the promise by him to warrant the genuineness of the power which they held to be established.

Lastly, my Lords, it was said by Romer L.J. that this is not an action on a warranty, and that a warranty and a contract of indemnity are distinct, one important difference being the period from which the Statute of Limitations would run. That, of course, is so, and the appellants admit that if they were suing on the warranty their action would be out of time. But I can see no legal reason why, in circumstances like those of the present case, it should not be held, if necessary, that the true contract to be implied from those circumstances is not

(1) [1902] 1 Ch. at pp. 621, 622. (2) (1857) 8 E. & B. 647, 658.

only a warranty of the title, but also an agreement to keep the person in the position of the appellants indemnified against any loss resulting to them from the transaction. And I think that justice requires we should so hold. I agree with the Lord Chief Justice that, as between these two innocent parties, the loss should be borne by the respondents who caused the appellants to act upon an instrument which turned out to be invalid.

I am therefore of opinion that the appeal should be allowed, and the judgment of the Lord Chief Justice restored with costs here and below.

LORD ROBERTSON. My Lords, after very full consideration, I am satisfied that the judgment of the Court of Appeal was wrong; and I adopt the reasoning of my noble and learned friends who have spoken to-day.

Order of the Court of Appeal reversed and judgment of Lord Alverstone C.J. restored with costs here and below: cause remitted to the King's Bench Division.

Lords' Journals, June 3, 1905.

Solicitors: *R. F. & C. L. Smith, for H. Sayer, Sheffield; Maples, Teesdale & Co.*

[HOUSE OF LORDS.]

H. L. (E.) 1905 July 3.

DUKE OF NORTHUMBERLAND AND ANOTHER . . . . . } APPELLANTS;

AND

ATTORNEY-GENERAL . . . . . RESPONDENT.

Revenue—Succession Duty—Tenant for Life—Remainder in Tail—Disentailing Deed—Alienation—Succession derived from Alienee—Succession Duty Act, 1853, *c.* 51, *ss.* 2, 15.

A., tenant for life of real property, and B., tenant in tail in remainder, executed a disentailing deed and sold and conveyed the property to C. On C.'s death D., as C.'s devisee, became entitled in possession to the property and paid succession duty thereon. Then A. died and the Crown claimed succession duty from B. and D. as on a succession from A.:—

Held, that succession duty was payable by D., to be calculated upon the life of D.

The decisions of Ridley J., [1903] 2 K. B. 71, and the Court of Appeal, [1904] 1 K. B. 762, affirmed.

In re Cooper and Allen, (1876) 4 Ch. D. 802, overruled upon this point.

In 1868 the sixth Duke of Northumberland, tenant for life of real estates, and his son the seventh and present Duke, tenant in tail in remainder, disentailed the estates and conveyed them to such uses as they should by deed jointly appoint. In 1870 they appointed by deed and sold a parcel of land, part of the estates, to Lord James Murray in fee simple. Lord James died in 1874, and his widow succeeded to the parcel as devisee under his will. She died in 1888, and her daughter Caroline succeeded to the parcel as devisee under her mother's will. Upon that succession Caroline Murray paid succession duty. The sixth Duke died in 1899. In 1902 Caroline Murray sold and conveyed the parcel to Mr. Bell. The Crown claimed succession duty as payable on the death of the sixth Duke, and brought an information against the appellants, namely, the seventh Duke and Caroline Murray, and also against Mr. Bell, claiming the duty from all three respectively.

Ridley J. gave judgment in favour of the Crown against the

seventh Duke and Caroline Murray, the Attorney-General not asking for judgment against Mr. Bell. (1)

This decision was affirmed by the Court of Appeal (Collins M.R., Romer and Mathew L.JJ.) (2)

Hence this appeal by the seventh Duke and Caroline Murray.

March 31; April 3. *Haldane*, *K.C.*, and *Danckwerts*, *K.C.* (*Austen-Cartmell* with them), for the appellants. Miss Murray having paid succession duty on the succession from her mother, no further duty is payable. It is true that by s. 2 of the Succession Duty Act, 1853, there was an inchoate liability on the seventh Duke to pay succession duty on the succession from his father, when his father should die, and that liability might be transferred to an alienee by alienation. If Lord James had survived the sixth Duke, he would have been liable to pay duty when the sixth Duke died, but there is no double duty when the alienee dies first. Sect. 15 of the Act imposes a duty when the succession has "become vested by alienation or by any title not conferring a new succession in any other person." This means "by alienation not conferring a new succession": *In re Cooper and Allen* (3), per Jessel M.R. In the present case the alienation did confer a new succession—the succession of Miss Murray from her mother, and such a case is excepted from s. 15. It is true that the view of Jessel M.R. was not approved by Lord Herschell in *Lord Wolverton* v. *Attorney-General* (4), but it is still law. By s. 20 the duty is payable only when the successor comes into possession: the Crown claims two duties in respect of one possession. Miss Murray came into possession not under the alienation but under the devise from her mother. The original inchoate liability is displaced by the new succession: *Attorney-General* v. *Cecil* (5); *Lord Braybrooke* v. *Attorney-General*. (6) It is said that the seventh Duke is a successor and so liable to duty on the death of the tenant for life. But by s. 20 the duty is payable only when the successor becomes entitled in possession to his succession. The seventh

(1) [1903] 2 K. B. 71.
(2) [1904] 1 K. B. 762.
(3) 4 Ch. D. 802.
(4) [1898] A. C. 535.
(5) (1870) L. R. 5 Ex. 263.
(6) (1860) 9 H. L. C. 150.

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Duke never did become entitled in possession. Then how can the duty be claimed from him? And Miss Murray never became entitled in possession to any succession from the sixth Duke. Her succession was from her mother. Lord James came into possession when the property was sold to him.

[They referred to *Attorney-General* v. *Littledale*. (1)]

But if succession duty is payable, it must be as on a succession by the seventh Duke, and the value should be taken as upon an annuity for his life and not upon Miss Murray's life. Sect. 15 says that the duty shall be paid at the same time and rate as if no alienation had been made. *Solicitor-General* v. *Law Reversionary Interest Society* (2) should be overruled. The claim of the Crown is that the duty is imposed upon the seventh Duke but is to be calculated upon the life of Miss Murray. Those two claims are not consistent with one another.

The appellants may also succeed upon the ground that the effect of the disentailing deed in 1868 was to destroy the estate tail of the seventh Duke and his succession. This would have been the result under the operation of a common recovery, and the Fines and Recoveries Act, 1833, does not interfere with that result. *Lord Lilford* v. *Attorney-General* (3) has no application to the present case; and see *Attorney-General* v. *Floyer* (4) and *Attorney-General* v. *Smythe*. (5)

Sir R. Finlay, A.-G. (*Sir E. Carson, S.-G.*, and *Vaughan Hawkins* with him), for the respondent. If the tenant for life the sixth Duke had died before the alienee it is admitted that two duties would have been payable. What difference can it make if the tenant for life dies after the alienee? By s. 1 succession denotes any property chargeable with duty under the Act. By s. 2 an inchoate liability was imposed upon the death of the tenant for life. By s. 15, when any succession has become vested by alienation in any other person, the duty shall be paid at the same rate and time as if no such alienation had been created. By s. 20 the duty shall

(1) (1871) L. R. 5 H. L. 290.
(2) (1873) L. R. 8 Ex. 233.
(3) (1867) L. R. 2 H. L. 63.
(4) (1862) 9 H. L. C. 477.
(5) (1862) 9 H. L. C. 497.

be paid when the successor becomes entitled in possession to his succession. By s. 21 the interest of the successor shall be considered to be of the value of an annuity to be valued upon the tables according to the age of the successor. By s. 42 the duty is a first charge on the interest of the successor and of all persons claiming in his right. Therefore both the appellants are liable to the duty, which must be calculated upon the life of Miss Murray. The opinion of Jessel M.R. on s. 15 is unsound, and was in fact overruled by this House in *Lord Wolverton* v. *Attorney-General.* (1) The alienation could not and did not confer any new succession upon Miss Murray. Her succession was twofold, first to the property upon the death of the tenant for life, and secondly upon the death of her mother. The fact that the father died before the tenant for life does not affect the liability to the two duties. The duty payable upon the death of the tenant for life being once created cannot be extinguished.

Haldane, K.C., in reply. The Crown must admit that upon their construction of s. 21 "successor" has a different meaning to the definition given to it in s. 2. The appellants' construction gives it the same meaning, and that is the only construction which makes the Act consistent.

The House took time for consideration.

July 3. EARL OF HALSBURY L.C. My Lords, I have read and have nothing to add to the judgment which my noble and learned friend Lord Macnaghten is about to deliver in this case.

Two observations I wish to make; I have made them before, and I have no desire to alter them.

One is that a succession within the Act once established, no manipulation of the parties afterwards can get rid of it; and the observation is equally true whether there be one or two successions.

The other observation is that since the decision of your Lordships' House in *Lord Wolverton's Case* (1) the judgment

(1) [1898] A. C. 535.

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of Sir George Jessel in *In re Cooper and Allen* (1) cannot be relied upon as an authority.

LORD MACNAGHTEN. My Lords, besides the question as to the effect of a disentailing assurance in the case of property chargeable with duty under the Succession Duty Act, 1853, this appeal involves the consideration of two reported decisions—*Solicitor-General* v. *Law Reversionary Society* (2) and *In re Cooper and Allen.* (1)

The question as to the effect of a disentailing assurance is not, as it seems to me, reasonably arguable, and if it were it would be concluded, I think adversely to the appellants, by the decision of this House in the case of *Lord Lilford* v. *Attorney-General.* (3)

In many ways the Succession Duty Act, 1853, is a remarkable piece of legislation. Drawn with consummate skill it avoids all technical expressions, and yet there is not a single word misused or out of place, nor any expression which it would be easy to improve. The Act was fortunate in its passage through Parliament. It was not mangled or marred or amended. The result is that it is consistent throughout, and as clear as the nature of the subject and the novelty of treatment which it required would permit. But to understand the Act thoroughly it is necessary to lay aside all preconceived notions and to follow patiently and persistently the clue which the Act itself provides.

The key to the Act is found in s. 2, which defines the terms "successor" and "predecessor," and explains the relation between predecessor and successor.

The Attorney-General argued that the word "successor" was a word of flexible meaning, and occasionally used rather loosely in the Act. With the utmost deference, I protest against that view. It has been the cause and I think the sole cause of all the difficulties that judges have discovered in the Act.

There are two things plain on the face of the Act. In the first place, it is clear that the terms "disposition" and "devolution" must have been intended to comprehend and exhaust

(1) 4 Ch. D. 802. (2) L. R. 8 Ex. 233.
(3) L. R. 2 H. L. 63.

every conceivable mode by which property can pass, whether by act of parties or by act of the law. In the next place, it is to be borne in mind that a "successor" must be beneficially entitled. When a person takes a succession he may not have actual possession. A husband, for instance, may have possession in right of his wife, a guardian on behalf of an infant. But a successor, to be a true successor within the meaning of the Act, must have the beneficial interest in the property subject to duty, whoever may have the actual possession or the right of management. These are obvious considerations. But they are frequently lost sight of, and then all sorts of difficulties arise. Let me put this case: a limitation after a death to A. for life, remainder to B. for life, remainder to C. in fee. In the lifetime of A. and B., C. sells his reversionary interest to X. Does X. become a successor? The Act says "Yes." But the learned judges in *Solicitor-General* v. *Law Reversionary Society* (1) answer "No." In that case the Court said: "the language of the 2nd section does not deal with the position of an alienee of a succession. . . . . The position of an alienee is a matter of legal consequence from the 2nd section, and not touched by the words of it." I must confess I cannot follow that observation. It seems to me that the position of an alienee is within the very words of s. 2. That section declares that "Every . . . . disposition of property," by reason whereof any person becomes beneficially entitled to property upon death, either immediately or after an interval, shall be deemed to confer on the person so entitled a succession, and it adds: "the term 'successor' shall denote the person so entitled." Now in the case I have supposed X. undoubtedly becomes entitled to property answering the description contained in s. 2 under the circumstances there mentioned, if the sale to him be a "disposition of property" within the meaning of the Act. In many cases the purpose of the Act would be defeated unless you give to the term "disposition" the largest possible signification—not only so, but the Act shews on the face of it that the term "disposition" includes a sale. Sect. 7 speaks of "any disposition of property not being a bonâ fide sale." And s. 17 is

(1) L. R. 8 Ex. 233.

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more significant still. It is to be inferred from it that the framers of the Act thought the expression "disposition of property" wide enough even to include contracts for the payment of money on post obits and under policies of insurance. Now, if an alienee be a true successor, the difficulties with which the Court of Exchequer struggled in the case of the Law Reversionary Society vanish altogether. The rate of duty and the time of payment are fixed by s. 15. The value of the annuity on which the duty is to be computed is determined by s. 21. There is no difficulty left except the difficulty, such as it is, which has been suggested in the construction of s. 44. And that vanishes too, if the alienee be a true successor within the meaning of the Act. The difficulty suggested was that s. 44 declares that "besides the successor" certain persons shall be accountable to the Crown for succession duty, and reckons among the persons accountable "every person" in whom any property or the management of any property subject to duty "shall be vested by alienation or other derivative title at the time of the succession becoming an interest in possession." It was said that an alienee cannot be a successor within the meaning of the Act, for here you have the alienee distinguished from the successor and placed in a different class. But there is no substance in that objection. Beneficial interest is the badge of a true successor, and a necessary qualification in his case, while the management of the property or the right to receive the rents may be vested in some other person, and so vested by alienation or other derivative title. It may be observed that unless an alienee coming into possession be a successor within the meaning of the Act he would be in a different position from a successor not taking by alienation. He would not be under the liability of s. 42, but only under the limited liability of s. 44—that is, only under the liability attaching to persons who have not the beneficial interest—a result which could hardly have been contemplated by the framers of the Act.

In the case of the Reversionary Law Society the learned judges of the Court of Exchequer got over the difficulty which they had themselves created by considering the inconvenience that might arise if a successor, after having parted with his

succession, were still to be treated as the successor for the purpose of ascertaining the value of the annuity on which duty is to be computed. And so they arrived at a right conclusion, but not, I think, by the most direct road.

I now come to the case of *In re Cooper and Allen.* (1) The question there turned on s. 15. That section is in my view the natural and necessary outcome of the position which the Act assigns to the alienee of a succession. He becomes a "successor" within the meaning of the Act, though the succession conferred on him is not a new succession. Who, then, is the "predecessor"? The predecessor must be the original successor who has parted with his succession, and so the duty on a succession by alienation could never be less than 10 per cent. when the alienee is not of kin to the person from whom title is derived. To prevent a result so unreasonable and inconvenient a special provision is introduced which declares that, in the case of a succession becoming vested by alienation, or by any other title not conferring a new succession in any person other than the original successor before he becomes entitled thereto in possession, neither the rate of duty nor the time of payment is to be altered. Sect. 15 says nothing about the value of the succession simply because, according to the view which I have ventured to present to your Lordships, the value of the succession is dealt with expressly by s. 21. Then in s. 15 occasion is taken to deal with the kindred subject of "acceleration" by the surrender or extinction of a prior interest. In the case of acceleration, but for the provision introduced at the end of the section, it might have been open to contention that duty would become payable at once on the surrender or extinction of the prior interest. The rate of duty, of course, would not be altered, nor the value of the succession. And so the section says quite properly that the duty is to be payable at the same time and in the same manner as if no such acceleration had taken place, and it says no more.

Some difficulty seems to have been created in some cases by the words "or by any title not conferring a new succession in any other person," which follow the words "vested by

(1) 4 Ch. D. 802.

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alienation" in s. 15. In the case of *In re Cooper and Allen* (1) Sir George Jessel appears to have been pressed by the difficulty, and perhaps misled by it. But a little consideration will shew that a succession may be transferred without conferring a new succession, not merely by alienation pure and simple, but also by a title which is either not alienation at all, strictly speaking, or alienation combined with something else. Take the case of escheat as the law stood when the Succession Duty Act was passed, or the case of leaseholds (which are real estate under the Act) seized under a fi. fa., or the case of a husband alienating his wife's reversionary interest in a term of years. These and other cases would come under the words in question and under the words "or other derivative title," which are used as their equivalent if held not to fall under the word "alienation."

The judgment of Sir George Jessel M.R. in *In re Cooper and Allen* (1) was disapproved of in the case of *Lord Wolverton* v. *Attorney-General.* (2) Your Lordships have heard an ingenious argument intended to set it up again. Can it be supported? I think not. The language of the Succession Duty Act, 1853, is too plain. In s. 15 it declares that "where . . . . any succession shall before the successor shall have become entitled thereto or to the income thereof in possession have become vested by alienation . . . . in any other person, then the duty payable in respect thereof, shall be paid at the same rate and time as the same would have been payable if no such alienation had been made . . . ." That is an enactment of general application. There is no exception to be found in the Act. But Sir George Jessel introduces an exception. He says in effect that the rule does not apply if there be a disposition or devolution conferring a new succession in respect of which duty is payable before duty becomes payable in respect of the succession transferred by alienation. In the present case it is not disputed that the succession of the seventh Duke was transferred to Lord James Murray, and that if the sixth Duke had died in the lifetime of Lord James duty would have been payable in respect of the seventh Duke's succession, and again

(1) 4 Ch. D. 802. (2) [1898] A. C. 535.

on Lord James' death, if on the death of Lord James the property had passed by disposition or devolution to Miss Murray. Why should payment of duty on the property left by Lord James discharge the duty with which the property was chargeable when he bought it? For such a vicarious exoneration there is no warrant in the Act. Nor is there in reason. When there is a sale of property chargeable with succession duty, provision is ordinarily made to meet the claim for duty when it arises. The Commissioners have power to commute the duty; the vendor may covenant to bear it, or it may be left to fall on the purchaser. In any case the duty is, or ought to be, taken into consideration in arriving at the price, and the money which goes into the pocket of the vendor is or ought to be so much the less. Why should the vendor, or it may be the purchaser's estate, get a windfall, and why should the Crown lose because the vendor happens to outlive the purchaser?

I think the appeal fails on all grounds, and ought to be dismissed with costs.

LORD DAVEY. My Lords, the Succession Duty Act, 1853, dealt for the first time with a difficult and complicated subject of legislation, but a careful consideration of the scheme and language of the Act will render the solution of the questions submitted to your Lordships for decision on this appeal free from any extraordinary difficulty.

By the disentailing deed of December 19, 1868, estates comprising the lands in question were conveyed by the sixth Duke (tenant for life) and the present Duke (then Earl Percy and tenant in tail in remainder) to such uses as they should jointly appoint, and in default to the subsisting uses. By a deed dated December 1, 1870, the sixth Duke and the present Duke in exercise of the power appointed the lands in question to Lord James Murray in fee.

The joint power created by the first deed was but the appropriate machinery for enabling the parties to make a conveyance of their respective interests by a simultaneous act, and so as to create one estate. Mr. Danckwerts, however, argued that the effect of the exercise of the joint power was to

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destroy the succession which previously existed in the present Duke, and therefore no duty under this Act became payable on the death of the sixth Duke. I am of opinion that the exercise of the power in favour of Lord James Murray had precisely the same legal effect as if the sixth Duke had conveyed his life estate, and the present Duke having disentailed, had conveyed the fee simple directly to the appointee by the deed of December 19, 1868, and he had been named as grantee in that deed, or as if the present Duke had conveyed the fee simple in remainder, and the sixth Duke had surrendered his life estate so as to pass the fee simple in possession. While I agree that the subject is not to be taxed by implication or unless he comes within the letter of the taxing Act, I think that the forms of conveyancing make no difference where the legal effect and substance is the same.

The principal point on this appeal depends on the construction of the 15th section of the Act. By the 1st section the term "succession" denotes "any property chargeable with duty under this Act," which, I think, would be more accurately expressed as any estate or interest in property which is chargeable with duty, though this is probably covered by the definition of property. By the 2nd section every disposition by reason whereof any person becomes beneficially entitled to any property upon the death of any person, and every devolution by law of any beneficial interest in property upon the death of any person, confers on the person entitled "a succession," and the term "successor" denotes the person so entitled. The cardinal fact to be borne in mind in the construction and application of ss. 14 and 15 is that in the case of real estate the successor, although entitled in fee simple, is charged only on an annuity commensurate with his personal enjoyment, i.e., in most cases for his life. Consequently, s. 14, which prescribes the rule in case of a succession passing by reason of death, can have no application to real estate, and is in terms confined to personal property. Sect. 15 deals with a different class of cases, and applies both to real estate and personalty. Grammatically, the words "not conferring a new succession" apply only to the word "title," and should be so construed;

but whether they are or are not applied to the word "alienation," I think that word in itself primâ facie means and should be construed as meaning only transfers inter vivos (either gratuitous or for value). The word is not apt to describe the passing of property from the dead hand, either by will or by intestacy. I think that a new succession can only be conferred by a new disposition or devolution by law to take effect on death, and conversely every derivative title by reason of death confers a new succession under s. 2 of the Act. The section, therefore, applies only to a title acquired by transfer or otherwise in the lifetime of the successor. It is not necessary to define how such other derivative title can be created. The words may only be intended to bring such title within the operation of the section, if any such title there be. Lord Herschell, however, has pointed out one instance of such title, namely, by bankruptcy, and there may conceivably be other circumstances and events in which the interest of the successor might become divested in favour of another. I am further of opinion that the transferee or person otherwise acquiring title thereby becomes the "person entitled" under the disposition or devolution conferring the succession within the meaning of s. 2, and "the successor" for the purposes of the Act, unless the context shews that the word is used in a different sense. And as at present advised (though it is unnecessary to decide it in the present case), I think that if the transferee of a succession in real estate were to die before he became entitled in possession to the property comprised in the succession, his devisee or heir would be a person holding by a title conferring a new succession in the same position exactly as the devisee or heir of an original successor so dying. So far I agree with Sir George Jessel.

But the present case is not one of a transfer of the succession only. I have already expressed my opinion as to the effect of the appointment under the joint power to Lord James Murray. I am disposed to think he became thereby in the position of a successor whose title in possession has been accelerated by the surrender or extinction of the prior interest, and, apart from the provision at the end of the 15th section, would have been presently liable to pay the duty, but by that

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provision for the benefit of the successor the duty is made payable only at the same time and in the same manner as such duty would have been payable if no acceleration had taken place. The words "in the same manner" are a little puzzling, but I think they mean that the Crown is not to lose the duty by reason of the estate of the successor having become an estate in possession or the limitations of the existing settlement being exhausted, and the duty is to be paid on the happening of the same event as it would if there had been no surrender of the prior interest, although nothing passed and no title in possession was acquired on that event.

In any case the transferee became entitled to a fee simple in possession, which became the subject of other dispositions and devolutions conferring successions depending on other events on which duty was properly payable; but that was not a satisfaction of the duty payable in the event of the death of the sixth Duke, which became a charge on the property, and all that can be said is that Lord James Murray purchased a property subject to an incumbrance. I am therefore of opinion that by the effect of the provisions in s. 15 of the Act a duty became payable to the Crown on the death of the sixth Duke at the same rate as it would have been payable if no transfer had been made.

It remains to inquire on whose life the duty is to be calculated under s. 21. It is argued that the opinion which I have expressed that the transferee becomes the successor for the purpose of the Act is inconsistent with subsequent sections, and that the word denotes only the original successor or transferor. I do not think so, and I think that such a construction would introduce confusion into the scheme of the Act. In s. 20 the words are: "The duty imposed by this Act shall be paid at the time when the successor or any person in his right or on his behalf shall become entitled in possession to his succession." Those words are not apt language in which to describe the transferee of the original successor. Bearing in mind that the Act applies to personalty as well as realty, and only to beneficial interests, I think the words relied on mean only any trustees, executors, husband entitled in right of his wife (as the law stood at the date of the Act), guardian of an infant

successor, committee of a lunatic successor, and so forth, and in subsequent parts of the section the word "successor" must at least include a person having a derivative title to the succession. Passing by s. 21 for the present, I think that in ss. 23 to 26 the word must from the context mean the person entitled to the succession at the date when it becomes an interest in possession. In s. 28 you again have the words "successor or any person on his behalf," and the succession is spoken of as his—i.e., the successor's succession, which it would not be if the successor meant only the original successor. Sect. 42 is not inconsistent with the construction I have placed on the Act, and in s. 44 the words used are, "every person in whom any property or the management of any property subject to duty shall be vested," and so forth. The object of this enactment seems to be to make the trustee or person having the management of the property liable for the duty as well as the "successor."

Returning to s. 2, I think the word "successor" is used in the sense which I have attributed to it. It would, however, be sufficient for the present purpose to say that the word is capable of either sense, but the context of this section shews that the "successor" means the person entitled to the succession at the date when it becomes an interest in possession. The appellant, Miss Murray, is in the position of such a successor, and I am of opinion that the duty should be assessed on the value of an annuity according to the tables for the residue of her life. I agree in the result with the judgment of Cleasby B. in *Solicitor-General* v. *Law Reversionary Society*. (1)

I am, therefore, of opinion that this appeal should be dismissed with costs.

LORD LINDLEY. My Lords, the judgments of the Master of the Rolls and of Romer and Mathew L.JJ. upon two out of the three questions raised by the appellants are so obviously correct that I feel unable usefully to add anything to them. Succession duty clearly became payable on two successions, and not upon one only, and the contention that the disentailing deed and conveyance to Lord James Murray extinguished

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or otherwise got rid of the duty payable on the death of the sixth Duke of Northumberland is, in my opinion, quite untenable.

The third question, namely, whether the duty now payable should be calculated on the life of the seventh Duke or on that of Miss Murray, is much more difficult, and turns upon ss. 2, 15, and 21 of the Succession Duty Act, 1853. The Court of Appeal considered this question settled by the decision of the Court of Exchequer in the case of *Solicitor-General* v. *Law Reversionary Society* (1) in 1873. This case has been acted upon ever since, and the Court of Appeal did not think it ought to be now overruled, even if wrongly decided, which they did not think it was. My Lords, I concur with the Court of Appeal in the view thus taken.

Until I had the advantage of reading the judgment of my noble and learned friend Lord Macnaghten, I felt more difficulty than I do now in dealing with some of the arguments addressed to your Lordships by the counsel for the appellants. But that judgment has put the matter so clearly that I will not trouble your Lordships with any additional observations on the construction of the Act. I am satisfied that his view of it is the true one, and that the appeal should be dismissed with costs.

Danckwerts, K.C., applied that the duty should not be claimed from the seventh Duke, appellant.

Order of the King's Bench Division varied by omitting the claim of duty and interest against the Duke; subject to this variation order of the King's Bench Division and order of the Court of Appeal affirmed and appeal dismissed with costs: cause remitted to the King's Bench Division.

Lords' Journals, July 3, 1905.

Solicitors: *Bell, Steward, May & How; Sir Francis C. Gore, Solicitor of Inland Revenue.*

(1) L. R. 8 Ex. 233.

[HOUSE OF LORDS.]

JOSEPH CROSFIELD & SONS, LIMITED, AND OTHERS . . . . . } APPELLANTS;

AND

MANCHESTER SHIP CANAL COMPANY RESPONDENTS.

H. L. (E.) 1905 July 24.

Company — Private Act — Statutory Agreement — Arbitration Clause — Compulsory Reference — Ouster of Jurisdiction — Manchester Ship Canal Acts 1885 *and* 1896.

The Manchester Ship Canal Act, 1885, s. 88, enacted that certain provisions for the protection of the corporation of Warrington and traders unless otherwise agreed on by the corporation and the Ship Canal Company should have effect, and by sub-s. 22 that any difference arising between the company and the corporation as to the meaning of the section or anything to be done or not to be done thereunder should be determined by an engineer to be appointed (unless otherwise agreed on) by the Board of Trade, whose decision should be final and binding on both parties.

By s. 202, any question arising between the company and any person touching anything to be done or not to be done or any money to be paid under the provisions of the Act should be determined by arbitration in manner provided by the Railways Clauses Consolidation Act, 1845.

An action having been brought by the corporation and traders against the company to enforce the statutory obligations:—

Held, upon a preliminary objection as to competency, that as to the corporation the action must be dismissed, the jurisdiction of the Court being ousted by the special provisions, but that the traders were entitled to proceed with the action and have the merits of their case determined.

The decision of the Court of Appeal, [1904] 2 Ch. 123, affirmed upon the first point and reversed upon the second.

THE decision of this appeal turned entirely upon the special and somewhat obscure provisions of the Manchester Ship Canal Acts, 1885 and 1896. The material sections of the Acts and the circumstances are fully and clearly set out in the report of the decision of the Court of Appeal (Vaughan Williams and Stirling L.JJ., Cozens-Hardy L.J., dissenting.) (1) The result of this appeal was to establish the opinion of Cozens-Hardy L.J.

(1) [1904] 2 Ch. 123.

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JOSEPH CROSFIELD & SONS, LIMITED v. MANCHESTER SHIP CANAL COMPANY.

Feb. 23; April 3, 4, 6. *Neville, K.C.*, and *Bousfield, K.C.* (*T. R. Hughes, K.C.*, and *Frederic Thompson* with them), for the appellants.

Moulton, K.C., and *Cripps, K.C.* (*Leigh Clare* with them), for the respondents.

Neville, K.C., in reply.

The House took time for consideration.

July 24. EARL OF HALSBURY L.C. My Lords, in this case the question of competency alone is before us at present. I agree entirely with what Cozens-Hardy L.J. has said, and I have nothing myself to add to his judgment.

LORD MACNAGHTEN. My Lords, it is no wonder, I think, that the preliminary question as to competency, which was argued fully before your Lordships, led to much difference of opinion in the Courts below. The provisions in the Manchester Ship Canal Acts of 1885 and 1896 as to arbitration are so various and so inconsistent that it is impossible to arrive at a conclusion which can be regarded as satisfactory from every point of view.

The question was raised for the first time when the parties went to trial. It does not seem to have been argued very seriously before Byrne J. who tried the case. His opinion was that the provision contained in sub-s. 22 of s. 88 of the Act of 1885 would have been enough to oust the jurisdiction of the Court if it had not been for the introductory words of the section, which declare that the provisions that follow shall have effect "unless otherwise agreed on between the corporation and the company." He thought that the parties might waive a provision which they were authorized to alter by agreement. I think there is a good deal to be said in favour of that view. But I am not satisfied that mere omission to insist on a statutory provision is equivalent to an agreement that the provision shall not have effect. The enactment at the commencement of s. 88 seems to require something more than tacit abandonment.

Upon appeal the decision of Byrne J. as to competency was reversed by a majority of the Court. The action so far as it was brought by the corporation was dismissed; so far as it was brought by the traders it was stayed till further order. For some reason which I do not quite understand Vaughan Williams L.J. held that the provision in sub-s. 22 of s. 88 in the Act of 1885 was not one of the provisions which the corporation and the company were competent to deal with by agreement. He thought that the jurisdiction of the Court as between the corporation and the company was ousted by sub-s. 22. Without expressing a decided opinion as to whether the traders had independent rights which they could enforce, he came to the conclusion that such rights, if they existed, could not be enforced unless and until the default of the company had been established in an arbitration between the company and the corporation. He did not think it necessary to consider s. 202 of the Act of 1885, which enacts that if any question should "arise between the company and any person touching anything to be done or not to be done, or any money to be paid," under the provisions of the Act, then, unless by the Act otherwise expressly provided, such question should be "determined by arbitration in manner provided by the Railways Clauses Consolidation Act, 1845." Stirling L.J. agreed with Vaughan Williams L.J. in his view of sub-s. 22 and in the general result of his opinion, though he thought the traders were entitled to enforce the provisions in their favour contained in s. 88. But he relied mainly, if not entirely, on s. 202, which Vaughan Williams L.J. left out of consideration.

On the other hand, Cozens-Hardy L.J., while agreeing that the jurisdiction of the Court was ousted as between the corporation and the company, held that the traders had statutory rights which they could enforce independently of the corporation, and that they were not compelled to resort to arbitration or to await the result of arbitration between the corporation and the company. His view was that s. 202 did not apply to a refund such as that which the traders claimed. It may have been intended, he said, to apply only to cases specified in the earlier parts of the Act, which provide for arbitration without

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designating the arbitrator or prescribing the mode of arbitration. At any rate, he thought that s. 202 was not so expressed as to exclude the jurisdiction of the Court.

On the whole, I am disposed to agree with Cozens-Hardy L.J. I have no doubt that the Manchester Ship Canal Acts do confer upon the traders independent rights which they are entitled to enforce. I do not find in either of those Acts anything which compels the traders to resort to arbitration for the purpose of enforcing their rights unless s. 202 of the Act of 1885 be held to have that effect, and on this point I agree with Cozens-Hardy L.J.

It is an unfortunate result, as Vaughan Williams L.J. observes, that cases relating to the same alleged obligations of the company should not be disposed of by one and the same tribunal; but I am by no means sure that the result would be more satisfactory if the questions between the company and the corporation under the Act of 1885 were referred to an arbitrator appointed by the Board of Trade, and those under the statutory agreement confirmed by the Act of 1896 to an arbitrator appointed by the President of the Institution of Civil Engineers, while the very same questions arising between the company and the traders were referred to arbitration in manner provided by the Railway Clauses Consolidation Act, 1845.

It seems to me that the corporation should be struck out as co-plaintiffs with the traders, but that the action should proceed as between the traders and the company, and that the company should pay the traders their costs both here and below, except so far as such costs have been increased by making the corporation co-plaintiffs.

LORD JAMES. My Lords, in this case the corporation of Warrington and certain traders are co-plaintiffs and the Manchester Ship Canal Company are the defendants. The action is brought principally to recover certain tolls paid to the canal company on the ground that certain dredging operations imposed by statute on that company had not been fulfilled.

Upon the hearing of the cause before Byrne J. it was submitted that the arbitration provisions contained in the original

Ship Canal Act of 1885, and in an agreement affirmed in a subsequent Act, so completely ousted the jurisdiction of the Court that even the assent of the parties could not give power to the Court to hear and determine the matters in dispute, and this preliminary objection has now been dealt with. After considerable hesitation I have come to the conclusion that the judgment given by Cozens-Hardy L.J. is correct, and that it ought to be followed. I agree with the view entertained by the Court of Appeal as between the corporation of Warrington and the ship canal company. The provisions of the Act of 1885 and the agreement of 1896 (confirmed by the Act of that year) being duly considered, the result is that the provisions of sub-s. 22 of s. 88 of the Act of 1885 amount to an ouster of the jurisdiction of the ordinary Courts, and that the tribunal created by that sub-section alone can determine the matters now in difference between the corporation and the canal company.

But I agree with Cozens-Hardy L.J. in holding that the case of the traders individually stands upon a different ground. The traders are not mentioned in the provisions I have referred to. But it is argued that s. 202 of the Act of 1885 places them in the same position as the corporation of Warrington, and that therefore, equally in respect to the traders, the jurisdiction of the Court is ousted. For the reasons given by the Lord Justice I do not accept this view, and although I think that the corporation may for some purposes represent the traders, I cannot agree that because the corporation must proceed by arbitration therefore the traders must do so also. Each of these traders may have an independent claim for damages yet would not be entitled to appear upon an arbitration between the corporation and the canal company.

I therefore think that the traders are entitled to proceed in the action, and that so far the appeal should succeed; and I agree with Lord Macnaghten's view as to costs.

Order of the Court of Appeal reversed: ordered that the corporation be struck out as co-plaintiffs with the traders, but that the action

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proceed as between the traders and the company, and that the company pay the traders their costs both here and below, except so far as such costs have been increased by making the corporation co-plaintiffs: cause remitted to the Chancery Division.

Lords' Journals, July 24, 1905.

Solicitors: *Burton, Yeates & Hart, for Alex. Wilson & Cowie, Liverpool; Grundy, Kershaw, Samson & Co.*

[HOUSE OF LORDS.]

H. L. (E.)
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MAYOR, &c., OF WESTMINSTER . . APPELLANTS;

AND

LONDON AND NORTH WESTERN RAILWAY COMPANY . . . . . } RESPONDENTS.

Local Government—Public Health—Sanitary Authority—Power to provide Sanitary Conveniences—Bonâ fide use of Statutory Powers—Public Health (London) Act, 1891 (*c.* 76), *s.* 44.

In providing sanitary conveniences under the Public Health (London) Act, 1891, s. 44, the sanitary authority must use their statutory powers bonâ fide and reasonably, and if they so act their discretion as to the mode of acting cannot be interfered with.

Where the conveniences are so provided under a street with a subway it is no objection that the public can use the subway as a means of passing from one side of the street to the other.

The decision of the Court of Appeal, [1904] 1 Ch. 759, reversed upon the facts, and the decision of Joyce J., [1902] 1 Ch. 269, restored by the Earl of Halsbury L.C. and Lords Macnaghten and Lindley, Lord James dissenting.

THIS appeal turned upon the evidence which with the arguments is fully set out in the judgments. The respondent company brought an action against the appellants claiming an injunction to restrain them from continuing to trespass on the

respondents' premises and to obstruct the footway opposite to the premises, and damages.

March 27, 28, 30. *Haldane*, K.C. (*Hughes*, K.C., and *D. Pollock* with him), for the appellants.

Younger, K.C., and *Shearman*, K.C. (*Eustace Hills* with them), for the respondents.

Haldane, K.C., in reply.

The House took time for consideration.

July 24. EARL OF HALSBURY L.C. My Lords, it seems to me that the power of the local authority to erect certain public conveniences cannot be disputed. The shape, site, and extent of them are left to the discretion of the authority in question, and so far as regards the things themselves, which, under this discretion, have been erected, I do not understand that any objection can be made. The objections, so far as they assume the force of legal objections, refer to the access to them, and to the supposed motives of the local authority in the selection of the site.

Assuming the thing done to be within the discretion of the local authority, no Court has power to interfere with the mode in which it has exercised it. Where the Legislature has confided the power to a particular body, with a discretion how it is to be used, it is beyond the power of any Court to contest that discretion. Of course, this assumes that the thing done is the thing which the Legislature has authorized: see *London, Brighton and South Coast Ry. Co.* v. *Truman*. (1)

It appears to me impossible to contend that these conveniences are not the things authorized by the Legislature. It seems to me that the provision of the statute itself contemplates that such conveniences should be made beneath public roads, and if beneath public roads some access underneath the road level must be provided; and if some access must be provided, it must be a measure simply of greater and less convenience, when the street is a wide one, whether an

(1) (1885) 11 App. Cas. 45.

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access should be provided at only one or at both sides of the street. That if the access is provided at both sides of the street, it is possible that people who have no desire or necessity to use the convenience will nevertheless pass through it to avoid the dangers of crossing the carriageway seems to me to form no objection to the provision itself; and I decline altogether to sit in judgment upon the discretion of the local authorities upon such materials as are before us.

I quite agree that if the power to make one kind of building was fraudulently used for the purpose of making another kind of building, the power given by the Legislature for one purpose could not be used for another; but I have endeavoured to shew that the Legislature did contemplate making subterranean works under the roadway and also access to them. Under these circumstances, I think it is a question of degree, and if there be the express provision, as I think there is, to make a tunnel under the street for the purpose of these conveniences, then I think the question of its extent or cost is a matter with which neither a Court of law or equity has any concern, since the thing contemplated by the statute has been done, and done in the way which the statute contemplated it might be done. That the public may use it for a purpose beyond what the statute contemplated is nothing to the purpose. I think the judgment of Joyce J. should be restored.

My Lords, with respect to the costs of this litigation, I cannot look over the fact that the local authority made a blunder and interfered with the footway. That has now been put right, but in the first instance it led to the litigation. Then, I think, the negotiation and correspondence was not as candid as it should have been, and I think, therefore, that neither side in this controversy should have any costs.

LORD MACNAGHTEN. My Lords, at the southern or lower end of Parliament Street, just before you come to Bridge Street, where in consequence of recent improvements there is a distance of about 100 feet between the opposite buildings, the appellants, as the sanitary authority of the city of Westminster, have constructed public lavatories and other

conveniences for the use of persons of both sexes. These conveniences are placed under the ground in the middle of the street, as far removed as possible from the buildings on either side. The plan of the construction is this: On each side of the roadway there is an entrance, five feet nine inches wide, protected by railings and leading by a staircase of the same width to a passage or subway, ten feet wide and eight feet high, which runs the whole way across on a level with the underground conveniences. Out of this subway there are openings—two for men and one for women—into spacious chambers, where the usual accommodation (politely described as lavatories and cloak-rooms) is provided on a large and liberal scale. All the arrangements seem to have been designed and carried out with due regard to decency, and with every possible consideration for the comfort of wayfarers in need of such accommodation.

The London and North Western Railway Company are the owners of a large and valuable block of buildings on the east side of Parliament Street, having a frontage to Parliament Street and a frontage to Bridge Street, with vaults under the pavement in Parliament Street, and a claim, for what it is worth, to the soil beneath the roadway up to the mid-line of the street. They took objection to the sanitary works constructed by the corporation, and sought to have them removed. They put their case alternatively as a case of trespass or of obstruction to the highway causing special damage. The corporation relied on their statutory powers under the Public Health (London) Act, 1891, which authorizes them to construct such public sanitary conveniences, and vests in them for the purpose the subsoil of the road, exclusive of the footway.

When the parties came to trial, it was found that owing to some mistake or inadvertence the works of the corporation had encroached on the footway. Joyce J., before whom the case was tried, ordered the corporation to remove the encroachment, but made no order as to costs. On appeal by the plaintiffs, the Court (Vaughan Williams, Stirling, and Cozens-Hardy L.JJ.) ordered the corporation to "pull down and remove the whole of the staircase, railings, and other works

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placed by the defendants upon the lands of the plaintiffs other than the conveniences in the pleadings mentioned, and such further portion of the construction as the Court" might, "upon application, sanction as a proper approach to the said conveniences." The order was to be suspended pending an appeal to this House, and the corporation were to pay the costs of the action and of the appeal. The corporation have acquiesced in the order of Joyce J. Their only contention now is that the order of the Court of Appeal is wrong.

There can be no question as to the law applicable to the case. It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first. But in the present case I think it will be convenient to take it separately.

Now, looking merely at what has been done—at the work as designed and actually constructed—it seems to me that, apart from the encroachment on the footway, it is impossible to contend that the work is in excess of what was authorized by the Act of 1891. The conveniences themselves, extensive as the accommodation is, have not been condemned by the Court of Appeal or even attacked in the evidence. Then the entrance from the roadway is only five feet nine inches wide; so is the staircase. It is in evidence that a width of four feet six inches is "necessary" in order to enable two persons to pass on the staircase. The witness who gave that evidence was pressed to say that "under ordinary circumstances four feet six inches to five feet would be a wide entrance for a thing of this sort." "No," he replied, "not ample. You want to give a minimum of five feet, if you can, and more than that. You would give six feet if you had got plenty of space." So the entrance actually provided, which has been condemned by the Court of Appeal, and as I think without evidence, is just nine inches wider than the minimum width which the only witness examined on the point says ought to be provided, and

three inches narrower than what he thinks should be allowed if space permits. It seems rather a strong measure to invoke the powers of the Court in so trifling a matter, especially considering that the excess, if excess there be, cannot make the slightest practical difference to the respondents. Then I come to the subway, which has not been opened to the public as yet. Now there is not a scrap of evidence tending to shew that there is anything improper or suspicious about the subway. One witness was asked if he had "ever known an approach to a convenience which was ten feet wide except this." He said he had not, and there the matter dropped. But then no instance could be given—at any rate no instance was given—of a convenience so large, placed in the centre of a street so wide, and approached from either side. If it is permissible to construct a convenience approachable from either side of a wide street, you cannot prevent the public from using the subway as a thoroughfare. I should think it most unlikely that it would be largely used, if used at all, by persons not desirous of availing themselves of the convenience. But it is possible; Vaughan Williams L.J. thinks it more than possible. He has "no doubt apart from the conveniences the subway at the present moment is a considerable convenience to pedestrians." There seems to be no experience to guide one on the point. And so the corporation were, I think, not to be blamed for making provision in order to obviate crushing and jostling in a place where crowding is (to say the least) not convenient. I have not forgotten that there are two passages in the evidence which one of the learned Lords Justices quotes at length, and on which all the members of the Court appear to rely. It seems that the chairman of the works committee admitted that this tunnel (as it has been called), ten feet wide and eight feet high, was "both an approach and a subway." That seems to have been thought a very damaging admission. Of course it was a subway. It was a subway capable of being used as a thoroughfare. It would have been a subway if there had been no thoroughfare. For my part, I do not quite understand all this play upon words. Then there was another passage in the evidence supposed to be more damaging still, in

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which a witness said that he did "not see any necessity for ten feet." It would, he admitted, be "a waste of space and a waste of money." But if you look at the context, it is perfectly clear that the learned Lord Justice was under a misapprehension. The witness was not referring to the subway, which was ten feet wide. He was not thinking of the subway. The questions put to him both by the learned counsel and by the judge were addressed to the entrance and staircase, to which very different considerations apply.

It was not suggested that there was any notice, or any intention of putting up a notice, directing the public to this subway as a means of crossing. The entrance, which was of the usual limited dimensions, did not of itself offer any invitation to the public to enter for the purpose of crossing the roadway.

Then I come to the question of want of good faith. That is a very serious charge. It is not enough to shew that the corporation contemplated that the public might use the subway as a means of crossing the street. That was an obvious possibility. It cannot be otherwise if you have an entrance on each side and the communication is not interrupted by a wall or a barrier of some sort. In order to make out a case of bad faith it must be shewn that the corporation constructed this subway as a means of crossing the street under colour and pretence of providing public conveniences which were not really wanted at that particular place. That was the view of their conduct taken by the Court of Appeal. "In my judgment," says Vaughan Williams L.J., "it is not true to say that the corporation have taken this land which they have taken with the object of using it for the purposes authorized by the Legislature." "You are acting malâ fide," he added, "if you are seeking to acquire and acquiring lands for a purpose not authorized by the Act of Parliament." So you are; there can be no doubt of that. The other learned Lords Justices seem to take the same view of the conduct of the corporation. Now this, as I said, is a very serious charge. A gross breach of public duty, and all for a mere fad! The learned judge who tried the case had before him the chairman

of the works committee. That gentleman declared that his committee considered with very great care for a couple of years or more the question of these conveniences in Parliament Street. He asserted on oath that "the primary object of the committee was to provide these conveniences." Why is this gentleman not to be believed? The learned judge who saw and heard him believed his statement. The learned judges of the Court of Appeal have discredited his testimony, mainly, if not entirely, on the ground of two letters about which he was not asked a single question—one written by the surveyor of the parishes of St. Margaret and St. John under the city engineer of Westminster, the other by a person acting for the acting town clerk. The letter of the surveyor was a foolish letter, which the writer seems to have thought clever. The letter of the temporary representative of the acting town clerk, if you compare the two letters, seems to have derived its inspiration from the same source. I cannot conceive why the solemn statement of the chairman of the committee should be discredited on such a ground. I do not think there is anything in the minutes tending to disprove his testimony. I entirely agree with Joyce J. that the primary object of the council was the construction of the conveniences with the requisite and proper means of approach thereto and exit therefrom.

I have felt more difficulty with regard to the question whether the corporation have acted altogether reasonably—"with judgment and discretion," as Turner L.J. puts it in a well-known case.

It seems to me that when a public body is exercising statutory powers conferred upon it for the benefit of the public it is bound to have some regard to the interest of those who may suffer for the good of the community. I do not think it is right—I am sure it is not wise—for such a body to keep its plans secret and carry them into execution without fair and frank communication with those whose interests may possibly be prejudiced or affected. I cannot help thinking that if the engineer of the corporation and the engineer of the railway company had been put into communication, some modification

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of plan might have been suggested which would have obviated all this litigation and expense, and all the litigation and expense yet to come if the Court of Appeal is to take upon itself, as it proposes to do, the functions of a sanitary authority and determine the precise dimensions of approaches to such a place as this. The surveyor thought it politic and not unworthy of his position as an officer of a great public body to try and throw dust in the eyes of his correspondent. I do not suppose that the officials of the railway company were put off their guard by the answer which he sent. I have no doubt they knew perfectly well what the corporation proposed to do. But still, the mode in which they were met prevented anything like a free interchange of ideas between these two bodies for their mutual advantage.

The result of these considerations to my mind is that if, at the trial, the respondents had suggested any practical mode of altering or amending the plans that would have obviated the inconvenience which the works as executed must cause to them, I should, speaking for myself, have been disposed to think that an injunction ought to have been granted to secure that object. Unfortunately, the respondents chose to stand aloof, and have given no assistance to the Court.

Under these circumstances I think there is no alternative but to allow the appeal, and to restore the judgment of Joyce J. But I think there ought to be no costs either here or in the Court of Appeal.

LORD JAMES. My Lords, in this suit the London and North Western Railway Company seeks by injunction to restrain the defendants, the present appellants, from maintaining a certain tunnel, staircase, and railings, and other works, upon land in Parliament Street, Westminster.

The facts upon which the questions in issue depend may, I think, be summarized as follows: In March, 1898, the then vestry of St. Margaret's, Westminster, had under consideration the desirability of constructing an underground convenience in the neighbourhood of the Houses of Parliament. On March 23 the vestry resolved: "That it be referred to the works and

general purposes committee to consider and report upon the question of constructing an underground convenience, with accommodation for men and for women, in or near Victoria Street."

During the month of July, 1898, a proposition for the making of a subway as well as the underground convenience was considered by the vestry; but under the date of January 11, 1899, the following minute appears: "In reference to the proposal for the construction of a convenience and subways at the south end of Parliament Street, and to the representations made on the matter to the First Commissioner of Works by direction of the vestry, of 27th July last, it has now been reported by the surveyor that the department does not intend to take any steps to provide the suggested subways, and has expressed the opinion that the construction of the convenience should not be commenced until after the coming session of Parliament. The committee are proposing to view the locality at an early date, and will report further in due course."

On February 8, 1899, the vestry resolved: "That the action of the committee in inquiring from the Office of Works whether the vestry might be permitted to construct the proposed convenience under the Peel Memorial be approved and adopted."

On June 1 a minute shews that the site (whereon the works have been carried out) "for a convenience" was determined upon. But the matter seems to have been reconsidered. The surveyor of the vestry furnished particulars of plans and reports for the construction of a subway at the point selected, being the junction of Parliament Street, Great George Street, and Bridge Street. From a perusal of the minute of January 24, 1900, it will be seen that the vestry was treating the subway, if not as an independent scheme, certainly as an important and necessary means of transit for the public, apart from any use of the underground convenience. There can be no doubt but that the vestry and its successor, the borough council, sought to provide for the public the means of crossing in safety by the subway instead of being subjected to the dangers arising from crossing at a spot much used for the purposes of vehicular

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traffic. It is true that persons who desired to use the convenience would approach it by the subway, but equally those who made no use of the convenience would cross through the subway from one side of Parliament Street to the other. The convenience and the subway seem to have been treated as distinct subjects. In the constructing contract of August 28, 1900, it is stated that tenders had been obtained "for the construction of a subway and underground convenience," &c., and the contractors undertook "to execute all the works, &c., in constructing a subway and convenience, &c."

When information had to be given to the railway company of the action of the vestry, Mr. Wheeler, their surveyor, wrote on September 20, 1900: "I am constructing, on behalf of the Westminster Vestry, and in accordance with their directions, a subway from one side of Parliament Street, &c." In this letter no reference is made to the construction of the convenience.

Further detail of the proceedings of the vestry and of the borough council may be avoided by accepting the statements made by the acting town clerk of Westminster in a letter dated December 6, 1900, wherein he says: "I was directed to explain that the intention is the construction of a subway to facilitate pedestrians crossing from one side to the other of a thoroughfare of great width and very considerable traffic, an object with which this committee consider your company will be in the fullest accord. . . . Admission to the conveniences, which will be accessible from the subways, could otherwise have been provided from refuges above them."

Additional light is thrown upon the nature and object of the works constructed by the oral evidence given at the hearing of the cause before Joyce J. Mr. Weaver, an expert witness called on behalf of the appellants, was questioned in respect of the necessary width of the approach to the convenience, and replied as follows: "Mr. Younger: That under ordinary conditions four feet eight inches to five feet would be a wide entrance for a thing of this sort if that was the only purpose for which it was used?—(*A.*) No, not ample. You want to give a minimum of five feet and more than that. You would give six

feet if you had got plenty of space. (*Q.*) It would be quite unnecessary to have it as wide as ten feet?—(*A.*) Yes, I do not see any necessity for ten feet." Mr. Smith, who had been chairman of the works committee of the vestry, admitted that the so-called tunnel would be both a subway and an approach.

Now upon these facts it seems to me to be clear that the intention of the local authority was to construct two distinct objects—a convenience with an approach and a subway. It is true that a portion of the subway would be used as the approach to the convenience; but the subway would also be used by those who did not intend to visit the convenience, but only desired to cross free of danger from one side of Parliament Street to the other. It is also clear that in consequence of this double user the subway was made of four feet greater breadth than would have been necessary if only an approach to the convenience had been constructed.

Such being a summary of the facts before your Lordships, it is necessary to consider with what legal powers the appellants and their predecessors were invested so as to authorize the construction of the works in question.

Inasmuch as the soil of the respondents has been taken without their sanction for the purposes of the works, the appellants must shew legal authority for such an act, and no assertion of good faith can confer legal powers upon a body which does not possess them.

By s. 44 of the Public Health (London) Act, 1891, power was conferred upon sanitary authorities to provide and maintain public conveniences, and in order to carry out the exercise of the power the subsoil of any road (required for the purpose) was vested in the sanitary authority. This is the only legislative authority under which a justification for the act done is alleged. It will be noted that there is no legislative power given to local authorities to construct subways.

Now I agree in the view that has been taken that the powers to construct a convenience under the Act of 1891 of necessity include a power to construct an approach thereto.

And so the question to be solved seems to be thus formulated: Was the so-called tunnel an approach to the convenience

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only, or was it something more? (1.) Was it a subway distinct from the approach, or (2.) was it a subway in combination with the approach used for two distinct purposes?

In my judgment the construction in question comes within one or other of the two latter alternatives. Possibly within the first, certainly within the second.

If this finding on the facts be correct, the works, so far as they constitute the subway, are constructed without legal authority. The Legislature has not thought it right to confer on local bodies the power to compulsorily take land or impose rates for the purpose of constructing subways. In this case some land has been taken which would not have been required if the approach had not been enlarged into a subway, and an unauthorized burthen has been imposed upon the ratepayers in consequence of this enlargement.

Thus it is, in my opinion, that the appellants have acted beyond their powers and without justification. I have only to add that the reasons for their judgment given by the Lords Justices in the Court of Appeal appear to me to be unanswerable, and I therefore think that those judgments ought to be affirmed and this appeal dismissed.

LORD LINDLEY. My Lords, by the Public Health (London) Act, 1891, s. 44, the appellants were authorized to provide and make and maintain public lavatories and sanitary conveniences in situations where they might deem the same to be required, and they were authorized to defray the expense of providing the same, and of any damage occasioned to any person by the erection and construction thereof, as if such expense was an expense of sewerage. Further, for the purpose of such provision the subsoil of any road exclusive of the footway adjoining any building was vested in the appellants.

My Lords, I cannot doubt that under this authority the appellants could lawfully construct lavatories and sanitary conveniences in, on, or under any road in their district, provided they did not interfere with any footway adjoining any building, or with the soil under any such footway. No particular size or form of convenience or mode of access to an

underground convenience is prescribed; and I see no reason why a convenience should not be made under a road with an underground access to it on each side of the road. The size and position of the convenience and of the access are left to the discretion of the appellants; and in the exercise of that discretion the locality, the amount of traffic, and the class of people likely to use the conveniences would naturally have to be considered. The cost is left to the good sense of the appellants; and I am not aware of any authority to shew that the High Court can properly grant an injunction to restrain a public body authorized to make a particular work for some public purpose from exercising its authority on the ground that in the opinion of the Court the work being made is larger or handsomer and more costly than it need have been. Still less can a mandatory injunction be properly granted in such a case. Matters of detail, of taste, and of expense in executing works authorized by statute are left to the constructing authority; and their decision on such matters is not open to review in an action for an injunction unless the Court is of opinion that the statutory authority is a mere cloak to screen a really unauthorized work. The case before your Lordships is not one of that description. Whether an expense unnecessarily incurred in constructing unauthorized work could be disallowed by an auditor or be thrown in some other way on the person who incurred it is a matter which your Lordships have not to consider on the present occasion, and I say no more about it. But the foregoing observations, favourable as they are to the appellants, do not exhaust this case as presented to your Lordships by the respondents. Their argument was partly based on another rule of law which it is desirable to notice.

Where a person is authorized by statute or by the common law to do what, apart from such authority, would be unlawful, e.g., to commit a trespass, and the authority is conferred for some distinct and definite purpose, and is abused by being used for some other and different purpose, the person abusing it is treated as a wrong-doer from the first, and not only as a wrong-doer in respect of what can be proved to have been an

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excess of his authority. It is presumed against him that the abuse of his authority shews an intention from the first to commit an unlawful act under colour of a lawful authority. This general principle was established in the well-known case known as the *Six Carpenters' Case* (1), on which there is an instructive comment in 1 Smith's Leading Cases, 127, ed. 10.

Counsel for the respondents urged that this principle was applicable to the present case, and deprived the borough council of any defence which they might have had if they had not exceeded their authority. In one respect the appellants did clearly exceed their authority, for they interfered with the pavement and the land under it, which they had no right to do. This, however, was put right by the injunction granted by Joyce J.

Mr. Shearman's argument had the charm of novelty, but he cited no authority for applying the principle of the *Six Carpenters' Case* (1) to such a case as this. I never heard of, and I cannot find any instance of, an injunction being granted to restrain the completion of works authorized by statute simply because the authority authorizing them has been exceeded, if the excess is abandoned and satisfaction for the injury caused by it has been made either by payment of money or by restoration in fact. In the absence of any such authority, I cannot accede to the argument of the learned counsel. The consequences would be most unjust and contrary to settled principles of equity. Still less would it, in my opinion, be in accordance with the principles on which mandatory injunctions are granted to compel the corporation to undo work done which, apart from the excess, can be shewn to be within their statutory authority.

My Lords, the respondents naturally rely very strongly on the minutes of the proceedings of the constructing authority, and on the letters written by their officials, and on the evidence given by Mr. Weaver at the close of his cross-examination. They contended that the sanitary conveniences were constructed in order to make a subway which without them could

(1) (1610) 8 Rep. 146 a.

not be lawfully made. But I do not think that the minutes and letters are sufficient to prove that the subway as constructed was, in fact, unauthorized by statute. On this part of the case I do not think it necessary to say more than that I concur with the observations of my noble and learned friend Lord Macnaghten. Having regard to those minutes and letters, I also am of opinion that the costs should be dealt with as proposed by him. Although the appellants succeed in their appeal, they have only themselves to thank for the litigation which they provoked.

Order of the Court of Appeal reversed and judgment of Joyce J. restored; each party to pay their own costs in the Courts below and in this House: cause remitted to the Chancery Division.

Lords' Journals, July 24, 1905.

Solicitors: *Allen & Son; C. de J. Andrewes.*

[HOUSE OF LORDS.]

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CLOUGH . . . . . APPELLANT;

AND

SAMUEL AND OTHERS . . . . . RESPONDENTS.

Bankruptcy—Act of Bankruptcy—Notice to suspend Payment—Bankruptcy Act, 1883 (*c.* 52), *s.* 4, *sub-s.* 1 (*h*).

A stockbroker, being hopelessly insolvent, told his Stock Exchange creditors that he would have a difficulty in paying them at the approaching settlement and suggested that they should close their accounts with him, which they did:—

Held (by the Earl of Halsbury L.C. and Lord Robertson, Lord Macnaghten dissenting), that the stockbroker had no intention in fact to give his creditors notice that he was about to suspend payment of his debts, and that there was in fact no such notice given within the meaning of the Bankruptcy Act, 1883 (c. 52), s. 4, sub-s. 1 (*h*).

ON May 26, 1903, Reis, a stockbroker, being hopelessly insolvent, had an interview with two of his Stock Exchange creditors in the presence of his solicitor, and the creditors were told that Reis would have a difficulty in paying them at the approaching settlement, and that they might wish to close their accounts with him. The same communication was made to two other Stock Exchange creditors, and all these creditors closed their accounts with him. On June 10 Reis executed two deeds by which he transferred real and personal property to the respondents, the trustees of his marriage settlement.

In bankruptcy proceedings which were instituted later Wright J. held that the statement to the creditors on May 26 was an act of bankruptcy under the Bankruptcy Act, 1883, s. 4, sub-s. 1 (*h*), and consequently that the deeds of June 10 were void against the trustee in bankruptcy under s. 47 of the Act. The Court of Appeal (Vaughan Williams, Stirling, and Cozens-Hardy L.JJ.) reversed this decision. The trustee in bankruptcy appealed.

June 5, 8, 27, 29. *Herbert Reed, K.C.*, and *A. J. David* (*Berthold Adler* with them), for the appellant, contended that

the decision of Wright J. was right upon all the points argued before the Court of Appeal and fully reported below. (1)

At the close of their argument,

THE EARL OF HALSBURY L.C. said that the House desired to hear the respondents' counsel only upon the first question, namely, whether the statement on May 26 was a notice that Reis was about to suspend payment of his debts.

Horridge, K.C., and *E. W. Hansell*, for the respondents, contended that Reis had no intention in fact to give any of his creditors notice that he was about to suspend payment of his debts, and that the communication did not amount to such a notice within the meaning of the Act.

They also referred to *In re Lamb* (2), where Bowen L.J. said: "I hope we are not going in the construction of this statute to be encumbered in the future with a mass of cases which are really decisions of fact, and which are to be cited hereafter as determining that special words used by a special debtor in a particular case do or do not amount as a matter of law to notice of suspension. That would be to enter a fatal groove as regards the construction of the statute."

Herbert Reed, K.C., in reply.

The House took time for consideration.

Aug. 1. EARL OF HALSBURY L.C. My Lords, there is only one point in this case upon which your Lordships called upon the respondents to support the judgment of the Court of Appeal, and that was how far the facts in this case shew an act of bankruptcy committed by Mr. Reis before the execution of the instrument sought to be impeached by the trustee in bankruptcy.

That, in fact, depends upon the facts as relevant to the new act of bankruptcy created by the Act of 1883. That Act for the first time made it an act of bankruptcy if the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts. In order to be an

(1) [1904] 2 K. B. 769. (2) (1887) 4 Morr. 25, 32.

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act of bankruptcy it must be a notice, and although the statute does not require any particular form of notice, still it must be a notice. I do not know that the word "notice" can be made clearer than it is by any verbal explanation, but it must be a notice.

The statute might have said that an admission of insolvency should be enough, or that a present state of insolvency should be enough, but it is sufficiently clear that neither one nor the other will be sufficient as an act of bankruptcy. In earlier times bankruptcy was a crime, and in dealing with our law to commit the crime it was necessary to commit an act of bankruptcy. Two most distinguished judges, Lord Selborne and Lord Watson, have pointed out in this House that a declaration of inability by a debtor does not of itself and without reference to context or circumstances satisfy the statute; and if I look to the circumstances or the words used, I concur with the Court of Appeal here that the debtor neither did nor intended to do any such thing as to give notice to his creditors or to any of them that he intended to suspend the payment of his debts.

What happened is, to my mind, very clear. Some speculative purchases on the Stock Exchange had been depressed in value and the pay-day was very near, and, Mr. Reis foreseeing difficulties in the future, went and consulted his solicitor. This solicitor was also solicitor to two of Mr. Reis's largest creditors, who were brokers, and a conversation ensued between the solicitor, who, having Mr. Reis with him at the time, procured these two creditors to come to him at once as he was in telephonic communication with them both.

"It was," says Mr. Spyer, the solicitor, "rather in the nature of a friendly meeting, so far as Mr. Lumsden and Mr. Hart were concerned" (the two creditors in question); and Mr. Spyer—being asked the question in plain terms whether he said anything about Mr. Reis's other creditors or not being able to meet his other creditors—says, referring to his professional experience in bankruptcy, "I was rather careful to say nothing of the sort." The two friends were intended to get authority from Reis to close their accounts so as to diminish the loss as much as possible when pay-day came.

It was then suggested that two other brokers were in the same condition, with accounts open, and it would be only fair to let them have the same liberty, and Mr. Spyer undertook to communicate to them his client's consent; but, to my mind, the last thing Mr. Reis had in his mind was a notice that he intended to suspend payment of his debts. His whole object was time, and—what he thought he explained himself—he thought that two days might make all the difference, and that "a rise was due because the depression was the result of a slump." I have no doubt he was hopelessly insolvent. I have no doubt his expectations of a rise were vain, but I suspect people who gamble on the Stock Exchange very often have vain expectations. But I think he had no intention of giving notice that he intended to suspend payment, either in express words or in anything he said, from which an ordinary business man would infer that what Spyer said on his behalf, or what he said himself, was a notice of intention to suspend payment of his debts. I daresay a business man would infer that he was likely to do it, or perhaps that he was likely even to become bankrupt, but he would infer that from the circumstances and not from anything said by either Spyer or Reis.

I move, therefore, that the appeal be dismissed.

LORD MACNAGHTEN. My Lords, the real point of this case has, I fear, been rather obscured by the length of the argument.

The question lies in the narrowest compass.

The Bankruptcy Act, 1883, creates a new act of bankruptcy. It declares that a debtor commits an act of bankruptcy if he "gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts."

Why was this provision introduced? Certainly not in order to afford the debtor an opportunity of communicating to his creditors the fact of his insolvency so that they might, if they should think proper, take proceedings to make him bankrupt. A declaration by a debtor of inability to pay his debts filed in the prescribed manner was an act of bankruptcy already. The object of the new departure is stated, and stated, I think,

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correctly, in the case of *In re Wolstenholme* (1) by one of the counsel in the course of his argument: "Before the year 1883," Mr. Yate Lee is reported to have said, "it was common practice for a trader to send out notices saying he was about to suspend payment. Afterwards, however, dealings often took place between the debtor and his creditors. That was felt to be unfair, and the object of the new Act was to meet the evil by making the notice of suspension a new act of bankruptcy in order to prevent these unfair dealings." I do not, of course, cite this passage as an authoritative exposition of the meaning of the Legislature, although it seems to have been accepted by the Court, and the learned counsel, as some of your Lordships may remember, was a gentleman of great experience in bankruptcy and the author of a well-known treatise on the subject. But I cannot conceive that this enactment could have had any other origin or any other purpose.

Now when this provision first came under the consideration of the Courts, a very narrow construction was put upon it. It was said that the notice must be in writing, and must declare an intention on the part of the debtor to suspend payment. It was said that the notice must be a notice intended to be communicated to all the creditors or to the body of creditors, and that the state of circumstances as disclosed must be such as to render it not merely improper, but actually fraudulent for the debtor afterwards to pay anybody. All these glosses, for which there seems to be no foundation in the Act, were, I had thought, swept away by the decision of the Court of Appeal in *In re Lamb* (2), and by the decision of the majority of the same Court in *Crook* v. *Morley*, affirmed in this House. (3) The notice need not be in writing. It is enough if notice is given to any one of the creditors. No particular form is required. There is nothing said in the Act about the debtor's intention. The question is what effect would the communication have on the minds of the persons to whom it is addressed. That is the test as laid down in this

(1) (1885) 2 Morr. 216. (2) 4 Morr. 25.
(3) [1891] A. C. 316.

House. It is only a matter of common sense, as A. L. Smith L.J. observed. All that is required is that a communication proceeding from the debtor, made seriously, should give the creditors or any of the creditors to understand from the state of circumstances as disclosed at the time that the debtor has suspended or that he is about to suspend payment. If it comes to this—I borrow the illustration from the judgment of Fry L.J. in *In re Lamb* (1), which was referred to by Lord Selborne in *Crook* v. *Morley* (2)—that the debtor has said in effect, "I am in a position at the present moment in which it is impossible for me to go on paying my creditors who may apply to me in the ordinary course of trade, and if I pay the first who apply there will be nothing left for the rest," that is an intimation that he will either immediately suspend payment or that he is "about to suspend payment" as soon as he reaches the end of his resources.

And now, what was the case here? An outside stockbroker has some uncollected debts calculated on a sanguine estimate to produce a few hundred pounds, and which ultimately brought in 60*l.* He has 7*l.* at his bankers, and not another penny in the world. The trustees of his marriage settlement have laid their hands on everything. Within a few hours he must find a sum already ascertained and known to exceed 10,000*l.* or be proclaimed a defaulter. He communicates with his creditors on the Stock Exchange. He makes his solicitor, a Mr. Spyer, his mouthpiece. Mr. Spyer explains to his creditors on the Stock Exchange the state of affairs and his client's hopeless insolvency with the view apparently of inducing them to accept a composition of something under 2*s.* in the pound, to be paid, not by the debtor himself, but out of a sum of 1000*l.* which he hoped to obtain from the trustees of his marriage settlement.

My Lords, there can be no dispute about the facts. I am not setting the recollection of one witness against the recollection of another. I accept the statement of Mr. Spyer. Mr. Spyer made at the time, in his bill of costs, a record of what occurred. That record states that he was requested by Mr. Reis to inter-

(1) 4 Morr. 25. (2) [1891] A. C. 316.

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view the brokers with whom he did business for the purpose of explaining the position, that he did attend Messrs. Lumsden and Hart both of them together, and afterwards Mr. Harris and Mr. Elliot separately, and that he did explain the position to each of them. The position I have already described. I have no doubt Mr. Spyer put it before the creditors honestly and truthfully. When the offer or suggestion of the 1000*l.* was rejected and the brokers closed their accounts, refusing to allow Mr. Reis to gamble any longer with their money, it seems to me that it must have been clear to these four stock-brokers, if they were persons of ordinary intelligence and knew anything about business, that Mr. Reis was about to suspend payment. The end was in sight. It might come to-day, or it might come to-morrow or the day after. But come it must. The age of miracles was past. There was nothing for it but suspension.

I would hold that Mr. Spyer's communication was notice that Mr. Reis was about to suspend payment of his debts. However, your Lordships think differently, and the result will be that the order under appeal will be affirmed, and the authority of *Crook* v. *Morley* (1), I am afraid, to some extent impaired.

LORD ROBERTSON. My Lords, this is a delicate case; but, after hearing the argument, I have come to a definite opinion in favour of the respondents.

It seems to me that in the conception of sub-s. (*h*), with which we have to deal, the suspension of payment of his debts is a specific and deliberate (in the sense of intentional) act of the debtor, and the suspension, actual or intimated, must apply to all the creditors. It is something different from and over and above inability to pay. It is one of the several courses among which a debtor may elect when he finds himself insolvent. A man faced by a balance-sheet which means certain and speedy ruin may try to arrange with his more pressing creditors, or he may put off the evil day and stagger on, leaving the stoppage of his career to be brought about by the

(1) [1891] A. C. 316.

action of others. Either of those courses is different from suspending payment of his debts.

It is, of course, entirely consistent with this view that the question whether notice of suspension has been given must depend on the import of what was said or written and is relied on as notice.

Now, the question is, Did Mr. Reis give notice that he had suspended payment of his debts, or was about to suspend it? It seems to me that he did nothing in that direction except to shew (to two of his creditors) his circumstances to be such that suspension of payment was one of the courses open to him. The occasion and object of the interview founded on was to arrange with two brokers about closing the account. It is true that at that interview disclosure was made of a state of affairs which would have justified suspension of payment. But to me it is equally clear that what is relied on as having been said did not, in its reasonable sense, import notice of an intention to take that step, and it is at least doubtful whether the tenor of the communication did not rather point in the opposite direction. Nor did the other persons present act as if a suspension was announced.

I agree in the judgments of the learned Lords Justices.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, August 1, 1905.

Solicitors: *W. H. Martin & Co.; Nordon & De Frece.*

[HOUSE OF LORDS.]

H. L. (E.) 1905 Aug. 3.

GUARDIANS OF WEST HAM UNION . APPELLANTS;

AND

GUARDIANS OF HOLBEACH UNION . RESPONDENTS.

Poor Law—Settlement and Removal—Illegitimate Child—Settlement by Residence—Irremovability—Residence by Child under Sixteen with Parent—Divided Parishes and Poor Law Amendment Act, 1876 (*c.* 61), *ss.* 34, 35.

An illegitimate child under sixteen resided with her mother in a parish for three years in such manner and under such circumstances in each of those years as would, in accordance with the statutes in that behalf, render her irremovable. After she reached sixteen the question of her settlement arose:—

Held, that by her residence she had acquired a settlement in that parish.

The decision of the Court of Appeal, [1904] 2 K. B. 121, affirmed.

EMMA NEEP, an illegitimate child, was born in the parish of Tilney St. Lawrence in the Wisbech Union in 1879. Her mother in 1881 married one Chapman. For three years (1890–1893) Chapman resided with his wife in the parish of West Ham in the appellant union in such manner and under such circumstances in each of those years as would in accordance with the statutes in that behalf render him irremovable from and settled in that parish. During the whole of those three years Emma Neep was under the age of sixteen and resided in that parish with her mother and Chapman. In 1899 she gave birth in the Holbeach Union workhouse to an illegitimate son for whose removal to the appellant union an order was made adjudging the son to be settled in the appellant union. The question was whether Emma Neep had acquired a settlement in the parish of West Ham under the Divided Parishes Act, 1876, ss. 34 and 35. If she had, the order was to be confirmed; otherwise, to be quashed. It was held that she had by the King's Bench Division (Lord Alverstone C.J., Wills and Channell JJ.), and that decision

was affirmed by the Court of Appeal (Collins M.R., Romer and Mathew L.JJ.) (1)

June 30; July 3, 4. *Avory, K.C.*, and *Montague Lush, K.C.* (*Grubbe* with them), for the appellants. Emma Neep being under sixteen during the whole of the three years when she resided with her mother could not by that residence acquire a settlement of her own. "Person" in s. 34 of the Divided Parishes Act, 1876, means only a person sui juris. The Act did not intend that an unemancipated child should acquire a settlement by residence with its mother. Sect. 35 fixes the age of emancipation at sixteen: till that age is reached a child retains the settlement of its parent and cannot acquire a settlement for itself by residence under s. 34: see per Lord Watson and Lord Macnaghten in *Highworth and Swindon Union* v. *Westbury-on-Severn Union*. (2) Emma Neep therefore must be deemed to be settled in the parish where she was born, since her settlement cannot be ascertained without inquiring into the derivative settlement of her mother.

Rawlinson, K.C., and *C. B. Marriott*, for the respondents. Emma Neep acquired a settlement for herself by the residence with her mother: *Reg.* v. *Elvet* (3) and the *Highworth Case*. (4) Her residence made her irremovable under the Poor Law Removal Acts of 1846, 1861, and 1865. Therefore by s. 34 of the Divided Parishes Act she acquired a settlement for herself. If part of the residence may be under the age of sixteen, the whole may be.

Lush, K.C., in reply. The two cases relied on by the respondents do not establish that a child under sixteen could acquire for itself a status of irremovability or a settlement.

The House took time for consideration.

Aug. 3. EARL OF HALSBURY L.C. My Lords, in this case, if it were res integra, I might be inclined to favour the view which Mr. Lush has urged upon us with so much ability. Indeed, I am not sure that I would not go further than he does

(1) [1904] 2 K. B. 121.
(2) (1889) 14 App. Cas. 465, 484.
(3) (1859) 2 E. & E. 266.
(4) 14 App. Cas. 465.

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and strive to bring back the meaning of the word "settlement" to the meaning it had when Bott and Lord Kenyon were its expositors; but the statute which has turned a "status of irremovability" into a settlement has rendered such an effort impossible.

The case of *Reg.* v. *Elvet* (1), expounded as it was by your Lordships in this House, decides the question here in debate. Rightly or wrongly, this House has decided that unemancipated residence could found a settlement in the *Highworth Case*. (2) I see no answer to what the Master of the Rolls points out, that if a part of the residence while under sixteen may be available to make up the settlement, with what logic could it be suggested that the whole residence under sixteen cannot do so also.

If that decision was wrong, we must abide by it till it is altered by an Act of Parliament. I move, therefore, that the appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, the question proposed in the special case for the opinion of the Court is whether Emma Neep, the mother of the pauper, acquired a settlement in West Ham under the Divided Parishes Act, 1876, ss. 34, 35.

The opinion of the Court of Appeal was in the affirmative.

In the result of that opinion I agree. But I was much impressed by the argument of counsel as to the difficulties that may arise if it be held that an unemancipated child can acquire a settlement by residence, no part of which is after emancipation. And therefore, without expressing disagreement with the view of my noble and learned friend on the Woolsack, I should be disposed to rest the case on s. 35 rather than on s. 34.

Emma Neep was herself illegitimate. Her mother married after Emma was born, and derived from her husband a settlement in West Ham. Emma Neep resided with her mother and her mother's husband in West Ham, and she took and followed her mother's settlement until she attained the age of sixteen. On attaining that age she "retained" her mother's

(1) 2 E. & E. 266. (2) 14 App. Cas. 465.

settlement. But her settlement then, in my opinion, ceased to be a derivative settlement and became a statutory settlement—a settlement created for the first time by the second clause of s. 35 of the Act of 1876. And thus Emma Neep acquired a settlement, which was no longer a derivative settlement, in the parish of West Ham.

By the first clause of s. 35 all derivative settlements are abolished with two exceptions—one in the case of a wife, which has no application to the present question; the other in the case of a legitimate child under the age of sixteen. In the latter case the child on attaining sixteen retains the settlement which it had taken up to that age. But it can no longer be a derivative settlement, for the enactment expressly abolishes derivative settlements with the two exceptions I have referred to. A corresponding result must, as it seems to me, follow in the case of an illegitimate child, though the provision is rather obscure owing to its brevity. "The practical effect of the second clause of s. 35 is," says Lord Watson, "to place illegitimate, as nearly as may be, on the same footing with legitimate children."

LORD ROBERTSON. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, August 3, 1905.

Solicitors: *F. E. Hilleary; Callard & Vulliamy, for Richard P. Mossop, Holbeach.*

[HOUSE OF LORDS.]

H. L. (E.) 1905 Aug. 3.

WILLIAM BRANDT'S SONS & CO. . . APPELLANTS;

AND

DUNLOP RUBBER COMPANY, LIMITED RESPONDENTS.

Debt, Assignment of—Equitable Assignment—Advance of Money to Vendor of Goods—Direction to pay Price to Lender—Judicature Act, 1873 (*c.* 66), *s.* 25, *sub-s.* 6.

Merchants agreed with a bank by whom they were financed that goods sold by the merchants should be paid for by a remittance direct from the purchasers to the bank. Goods having been sold by the merchants, the bank forwarded to the purchasers notice in writing that the merchants had made over to the bank the right to receive the purchase-money and requested the purchasers to sign an undertaking to remit the purchase-money to the bank:—

Held, that there was evidence of an equitable assignment of the debt to the bank with notice to the purchasers, and that the bank could recover the debt from the purchasers.

The decision of the Court of Appeal, [1904] 1 K. B. 387, reversed, and the decision of Walton J. restored.

THIS appeal turned upon the evidence given at the trial before Walton J. without a jury. The facts and the contention on both sides are fully stated in the judgment of Lord Macnaghten.

April 6, 7. *Haldane, K.C.*, and *J. A. Hamilton, K.C.* (*A. H. Chaytor* with them), for the appellants.

Cripps, K.C., and *Montague Lush, K.C.* (*F. P. M. Schiller* with them), for the respondents.

Haldane, K.C., in reply.

The House took time for consideration.

Aug. 3. EARL OF HALSBURY L.C. My Lords, in this case I so entirely concur with my noble and learned friend Lord Macnaghten that I feel it unnecessary to add a word to what he is about to say in support of the judgment he proposes.

LORD MACNAGHTEN. My Lords, owing to the singular mode in which the respondents choose to conduct their business there is a little confusion about the transaction which led to the present controversy. But the material facts are plain enough, and the case, as it seems to me, is free from difficulty.

The appellants, William Brandt's Sons & Co., whom I will call Brandts, are bankers in London. Kramrisch & Co., who are now bankrupt, were rubber merchants in Liverpool. Their business was "financed," as it is called, by Brandts, and also by another firm of bankers trading as Kleinwort & Co. The arrangement was precisely the same in both cases. When Kramrisch & Co. made a purchase at home or abroad approved by the bankers, it became the duty of the bankers to provide the necessary funds, and by way of security they took delivery of the goods to themselves. Then when Kramrisch & Co. found a purchaser approved by the bankers they released the goods and gave Kramrisch & Co. a delivery order, relying on a written undertaking in each case that the price should be paid direct to them, and receiving an engagement in writing that in the meantime Kramrisch & Co. would hold the goods and the proceeds in trust on their behalf, and grant them "the sole and absolute lien on said goods and their proceeds" until they obtained full payment of the advance, together with their charges. Every transaction was to be dealt with separately and kept distinct.

In accordance with this arrangement Kramrisch & Co., towards the end of the year 1902, bought a parcel of rubber which they sold to the respondents, the Dunlop Rubber Company, on December 30, 1902. In connection with this purchase Brandts had advanced 3430*l.* The goods were delivered to the Dunlops on January 5, 1903, at their mills in Birmingham known as Para Mills. With the goods there was sent an invoice on which there was stamped a note requesting the Dunlops to remit the amount of the invoice to Brandts. There was a mistake of a few shillings in the figures. The invoice was returned to Kramrisch & Co. for correction. The figures had originally been 3263*l.* 16*s.* 4*d.*; the amount as corrected was 3263*l.* 4*s.* 2*d.* After some correspondence Kramrisch & Co.

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sent the Dunlops a corrected invoice for that amount, but the stamped direction for remittance to Brandts did not appear on the corrected invoice; and apparently the clerk at Para Mills, whose duty it was to attend to the correspondence, did not keep a copy of the original invoice or take note of the direction as to payment.

When the goods were delivered at Para Mills, Kramrisch & Co. sent to Brandts a printed form consisting of two parts—(1.) a letter addressed by Kramrisch & Co. to the Dunlops, and (2.) a letter intended to be signed by or on behalf of the Dunlops, and to be returned by them direct to Brandts. This letter, which is referred to by Brandts as "the counterpart," was printed on the same sheet side by side with letter No. 1, but was readily detachable from it.

The printed form as filled up in writing with the corrected figures, but without signature by or on behalf of the Dunlops, was as follows: "Kramrisch & Co., Liverpool, 6th January, 1903. Messrs. the Dunlop Rubber Company, Ltd. Dear Sirs,—We should thank you to kindly sign the attached letter and forward same to Messrs. Wm. Brandt's Sons & Co., London, E.C. Yours very truly, Kramrisch & Co." The attached letter was this: "Para Mills, Birmingham,—January, 1903. Messrs. Wm. Brandt's Sons & Co., 4, Fenchurch Avenue, London, E.C. Dear Sirs,—Herewith we beg to confirm that we shall remit, subject to approval of goods, the amount of invoice—

£369 2*s*. 10*d*. for 8
£3263 4*s*. 2*d*. for 75 } Packages raw rubber,

received to-day from Messrs. Kramrisch & Co., Liverpool, when due, direct to your good selves for account of Messrs. Kramrisch & Co. Yours faithfully." Brandts sent on this form entire inclosed in the following letter: "Dated London, 7th January, 1903. Dear Sirs,—Inclosed we beg to hand you a letter received from Messrs. Kramrisch & Co., Liverpool, referring to 8 packages India-rubber, amounting to 369*l*. 2*s*. 10*d*.; 75 packages India rubber, amounting to 3263*l*. 16*s*. 4*d*., which Messrs. Kramrisch & Co. advise having forwarded to you. We request

you to kindly return to us the counterpart duly signed by your good selves. And remain, dear Sirs, yours truly, (Signed) Wm. Brandt's Sons & Co. The Dunlop Rubber Company, Ltd., Para Mills, Birmingham."

The "8 packages India-rubber, amounting to 369*l.* 2*s.* 10*d.*," were the subject of a separate transaction. They may be left out of consideration in the present case. There was no mistake about that parcel, and the price was duly remitted to Brandts.

The clerk at Para Mills, who had charge of the correspondence there, was one A. G. Paterson, who was an assistant under Gooding, the manager at Para Mills. He was entrusted with the company's rubber-stamp, which bore upon it the words "For the Dunlop Rubber Company, Ltd., Para Mills, John Gooding." When Paterson used the stamp he added his initials, A. G. P.

Paterson in due course received and opened Brandts' letter of January 7 addressed to the Dunlop Rubber Company. He corrected the figures in the counterpart letter inclosed in it, and advised Kramrisch & Co. that he had made the correction. He signed the counterpart with the company's rubber-stamp, adding his own initials, and returned the counterpart so signed to Brandts. But he did not send a copy of the correspondence to the head office in London, from which all cheques were issued. Nor did he inform the head office of what he had done. He merely sent up the corrected invoice. The consequence was that instead of remitting the sum of 3263*l.* 4*s.* 2*d.* to Brandts, as specially directed by Kramrisch & Co., the Dunlop Rubber Company, in compliance with a previous general order from Kramrisch & Co., paid the amount by cheque to Kleinwort & Co., who had not financed this particular transaction, and had nothing whatever to do with it. Ultimately Brandts wrote to the Dunlops pressing for the remittance, which was then overdue. They replied on February 9, 1903, that the amount had been paid, and added that they held Kramrisch & Co.'s receipt for it.

Then this action was brought by Brandts in the Commercial Court against Dunlops to recover the amount due. Walton J. decided in favour of the plaintiffs. The Court of Appeal,

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however (Lord Alverstone C.J., Collins M.R., and Romer L.J.), reversed his judgment, and dismissed the action with costs.

It was contended at your Lordships' bar that there was no evidence that a note directing the remittance to be made to Brandts was stamped on the original invoice which had been lost. Your Lordships thought it right to send for Kramrisch & Co.'s press copy letter-book. On inspection of this book it appeared that the original invoice contained the note in question. Walton J. found as a fact that it was there, and I think he was right. However, it does not seem to me to be a necessary or material part of the plaintiffs' case, and I will assume in favour of the respondents that the original invoice did not bear this note.

Then it was contended that neither Gooding nor Paterson—Gooding seems to have been abroad at the time—had authority to put the company's rubber-stamp on the counterpart letter of January 8, 1903. This again seems to me not to be a necessary or material part of the plaintiffs' case. I will assume, as the Court of Appeal held, and as Walton J. appears to have thought, that neither Gooding nor Paterson had real or apparent authority to commit the company to a direct engagement with Brandts. But, speaking for myself, I am not so clear upon the point. Brandts write to the company a letter addressed to the company at their works, asking the company, in accordance with the request of their creditors, Kramrisch & Co., for remittance of the money which was due to Kramrisch & Co. The expression "we beg to confirm that we shall remit" in letter No. 2 obviously, as I think, was intended to refer, and must have been understood by Paterson as referring, to the note or direction as to remittance, which, according to the company's evidence, was invariably stamped on the invoice.

The Court of Appeal say that neither Gooding nor Paterson had authority to bind the company to a new contract—to "a fresh bargain." But was it a fresh bargain? The company receive a notice which prevents them from paying the debt due to Kramrisch & Co. to anybody but Brandts. An engagement to do what they were bound to do, and what they might do

with perfect safety, is hardly a fresh bargain. If the company, or Paterson on behalf of the company, had replied that the required assurance would not be given, or had failed to answer Brandts' request, an injunction would no doubt have been applied for and granted at once, and the company would have had to pay the costs of the action. It was almost a matter of course to give the required assurance. As Mr. Du Cros, the company's managing director, said in cross-examination, if they had been told to pay Brandts they would do so in the ordinary course of business. "It doesn't cost us anything," he added. When Brandts, in answer to a request addressed to the company, received a letter from the company's office purporting to be an answer on behalf of the company—and the only answer that could have been sent without provoking immediate litigation—Brandts would have been justified, I should have thought, in accepting the reply as authentic and sufficient. Surely it was no concern of theirs to inquire how the routine business of the company was distributed in the company's office. However, I will not pursue the matter further. I put out of consideration both the note on the original invoice and the signature, which purports to be a signature on behalf of the company to the counterpart letter of January 8.

The whole question, then, depends on the meaning and effect of Brandts' letter of January 7, 1903, and its inclosures. Were these documents, sent as they were to the company and received by the company, notice that Brandts were interested in the money, or what was their meaning? Does a business man who merely wants his debtor to pay the amount of the debt into his bank employ such elaborate machinery as this? Did anybody ever hear of such a complicated process, if that was all that was meant? At any rate, the company's secretary, Mr. Bergin, admits that he never heard of such a thing. The strangest part of this case is that nobody seems to have had the slightest doubt as to the meaning of these documents. "That was notice to Dunlops," says Walton J., "and, in fact, was more than notice. It was notice to Dunlops that Messrs. Kramrisch had made over to Brandts the right to receive this

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sum of money, and had given to Brandts power to give a perfectly good receipt and discharge for it. It is more than notice of course. It is notice plus a request that the bank" (? company) "would acknowledge that notice by undertaking to pay."

The Lord Chief Justice does not seem to have taken a different view on this point. Although he dismissed the action on the ground that the documents did not amount to an absolute assignment within the section of the Judicature Act on which reliance was placed, and were therefore not a legal or equitable assignment, he thought "the notice would have been a good notice if the assignment had been an absolute assignment," and he thought the documents were "an authority to the Dunlop Company to pay the money over on Kramrisch's behalf to Brandts." Then I would ask your Lordships to turn to the evidence of Mr. Bergin, who was one of the secretaries of the company, and, as the learned counsel for the company said, "a great deal more than secretary," for, as the learned counsel told the Court, "he managed the whole business." Mr. Bergin was asked in cross-examination this question: "(*Q.*) Supposing that you had received that direction sent on by the Brandts, you would have thought, would you not, that Brandts had a charge or were interested in this money?—(*A.*) I think I would. I would have thought that there was some such arrangement."

That, my Lords, is the whole case. It is difficult to conceive a plainer case of an equitable assignment or a clearer case of notice to the debtor. As between Kramrisch & Co. and Brandts the case was complete, and more than complete, without Brandts' letter of January 7 and its inclosures. There was an undertaking that the money should be paid direct to Brandts. There was besides a declaration of trust. There was an engagement to give Brandts "a sole and absolute lien," that is, sole and absolute control and dominion over the proceeds of the goods. Then the Dunlops receive through Brandts a notice which no man of business could mistake, telling them, on Kramrisch & Co.'s express authority, that they are to pay to Brandts the money which they owe their

creditors, Kramrisch & Co. What more could be required? Dunlops disregard that notice, and pay the wrong people. They must pay the money over again, and pay it to the right person.

With the utmost deference to the Court of Appeal, I have great difficulty in following their reasoning. The plaintiffs' case was put in two ways. It was presented as a case within sub-s. 6 of s. 25 of the Judicature Act. It was also presented as a simple case of equitable assignment perfected by notice. Unfortunately, the stress of the argument was laid on the Judicature Act. The Court of Appeal devoted almost the whole of their attention to it. The substantial question—the only question worth considering—was all but ignored. It was treated as subordinate to the question on the statute and bound up with it. The Lord Chief Justice, with whom the other members of the Court agree, says: "I come to the conclusion that this document"—that is Brandts' letter of January 7 and its inclosures—"does not fulfil that which is necessary in order to entitle the plaintiff to sue, whether suing as equitable or as legal assignee, on the ground that it is not an absolute assignment or an assignment at all within that section."

Why that which would have been a good equitable assignment before the statute should now be invalid and inoperative because it fails to come up to the requirements of the statute, I confess I do not understand. The statute does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree. Where the rules of equity and the rules of the common law conflict, the rules of equity are to prevail. Before the statute there was a conflict as regards assignments of debts and other choses in action. At law it was considered necessary that the debtor should enter into some engagement with the assignee. That was never the rule in equity. It "is certainly not the doctrine of this Court," said Lord Eldon, sitting in Chancery in *Ex parte South.* (1) In certain cases the Judicature Act places the assignee in a better position than he was before. Whether the present case falls within the favoured class may perhaps be doubted. At any rate, it is

(1) (1818) 3 Swans. 392; 19 R. R. 227.

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wholly immaterial for the plaintiffs' success in this action. But, says the Lord Chief Justice, "the document does not, on the face of it, purport to be an assignment nor use the language of an assignment." An equitable assignment does not always take that form. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice, he does so at his peril. If the assignment be for valuable consideration and communicated to the third person, it cannot be revoked by the creditor or safely disregarded by the debtor. I think that the documents which passed between Brandts and the company would of themselves, and apart from Kramrisch & Co.'s undertaking and engagement given to Brandts, have constituted a good equitable assignment. But the real question is, were they notice to the company that Brandts were interested in the money? As between Kramrisch & Co. and Brandts the assignment was, as I have already said, perfect without them.

In a case like this it would, I think, be pedantry to refer to authorities. But as a good many cases appear to have been cited in the Courts below, I may perhaps be forgiven if I venture to mention, though only by name, such well-known cases as *Ex parte South* (1); *Jones* v. *Farrell* (2); *Diplock* v. *Hammond*. (3)

Strictly speaking, Kramrisch & Co., or their trustee in bankruptcy, should have been brought before the Court. But no action is now dismissed for want of parties, and the trustee in bankruptcy had really no interest in the matter. At your Lordships' bar the Dunlops disclaimed any wish to have him present, and in both Courts below they claimed to retain for their own use any balance that might remain after satisfying Brandts.

(1) 3 Swans. 392; 19 R. R. 227. (2) (1857) 1 D. F. & J. 208.
(3) (1854) 5 D. M. & G. 320.

It is quite plain how the error in this case arose. It was all due to the mode in which the Dunlops conduct their business. At Para Mills, where they have a large establishment and employ between 1000 and 1500 workmen, they have a manager who attends to the practical part of the business. The manager, Mr. Gooding, was called, but he could give very little information. He was abroad when the important letters came to the office. If he had been at home he would have known nothing about the matter. He was "not interested," as he says, "in these things at all." He only saw the letters which Paterson chose to shew him. Everything really depended upon Paterson. Paterson was not called. It was hardly to be expected that the company would wish to see him in the box. He seems to hold a very delicate and responsible position. He opens all the correspondence that comes to Para Mills, and deals with it apparently just as he thinks fit. Some letters he lays before Gooding, some he sends to the head office, and some he puts aside. Unfortunately he did not think it worth while to send to the head office Brandts' letter of January 7, 1903, and its inclosures. The head office, therefore, knew nothing about this equitable assignment, and they paid the money to the wrong man because Kramrisch on a former occasion had given them a general direction to pay Kleinwort & Co. The difficulty, as Mr. Bergin admitted, was "owing to the neglect of duty at Birmingham." It would be unreasonable to make Brandts suffer for that.

I think the appeal must be allowed, and the judgment of Walton J. restored with costs here and below.

My noble and learned friend Lord Lindley desires me to say that he has read this judgment and concurs in it.

LORD JAMES. My Lords, agreeing as I do with the result of the judgment already delivered by my noble and learned friend Lord Macnaghten, I do not propose repeating a detailed statement of the facts of this case.

For the reasons stated by my noble and learned friend Lord Macnaghten, I concur in the view that an equitable assignment of the debt sought to be recovered is established,

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and that the judgment of the Court below erred in dealing with the question as arising under the Judicature Act only. The defect in the parties to the suit can be remedied. But for myself I go further, and think the plaintiffs are entitled to recover upon the ground that Dunlops undertook to pay them the amount in question. It seems to me that when the plaintiffs received the letter from the defendants of January 8, 1903, signed by Gooding, they were entitled to rely and act upon it.

In respect to this question the controlling facts appear to be as follows: The defendants carry on business at two mills, the Para Rubber Mills and the Manor Rubber Mills; their head office is in London. At the Para Mills a Mr. Gooding was the manager, apparently for all purposes—at least there was no other manager. But the course of business between him and his employers, the defendants' company, seems to have been that in matters relating to the general financial business of the concern, so far as they had to pass through the Para Mills, Mr. Gooding by himself or a subordinate would seek instructions from the London office, and the result of the evidence is, I think, that he ought to have so done in respect of the transactions under consideration.

But in regard to those who were dealing with the Para Mills, the question presents a different aspect: they would know nothing of the internal arrangements of the company; they would know nothing probably of the London office. Apparently the course of business was that communications to correspondents in respect of finance would be made from the Para Mills under Gooding's signature. I gather this from the document of December 4, 1902, and from the evidence given by Mr. Du Cros, which was as follows: "(*Q.*) A person writes a business letter to the Dunlop Rubber Company at the Para Mills. Whom would that letter be brought before in the ordinary course of business?—(*A.*) The manager, Mr. Gooding. (*Q.*) Would Mr. Gooding be the person authorized by the head office to affix the signature to the answer to that letter?—(*A.*) All letters, even the Para Mills letters, are signed by the name of the company, and Mr. Gooding's signature as manager.

(*Q.*) Therefore a letter addressed to the Para Mills, Birmingham, would be answered by a letter bearing Mr. Gooding's signature or stamp?—(*A.*) Whether dictated by him or not, it would be signed by the stamp of the company with his name."

Now when the plaintiffs communicated with the defendants on January 6 and 7, they wrote to the right place and to the right body—the company. Those communications were, according to the business arrangements of the company, received and opened by the agents authorized by the company to receive and deal with them. And when the reply was sent on January 8, it was in due form signed by the manager, who, subject to receiving authority from the London office, ought in due course so to have signed the reply.

Thus the correspondent, making an inquiry to the right office, receives in due course a reply from the person whose duty it was to receive and reply to such communication.

In the case we are considering the manager, Gooding, having failed to inform the London office of the undertaking of January 8, given by him to the plaintiffs, payment of the larger sum of 3263*l.* was made in pursuance of previous direction to make payments to another firm, and the company, having done so, repudiate Gooding's undertaking, and refuse to pay the amount in question twice over.

If this point stood alone it would be for your Lordships to determine which of the parties to the litigation should bear such loss. In my opinion the loss ought to fall upon the defendants. Gooding was the person authorized by the defendants to deal with their correspondence—to receive and reply to letters; that he neglected his alleged duty when he omitted to seek specific orders from London may be the case, but the neglect was that of the defendants' agent, and it is more reasonable that the result of it should be borne by his employers than by those who could know nothing of the existence of the alleged duty, or of the omission to fulfil it.

But this determination of liability depends upon the view that Gooding was held out by the defendants as a person upon whose communications the plaintiffs were entitled to rely. To

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hold otherwise would, I think, tend to encourage a want of confidence in commercial transactions to an extent which would be most undesirable.

I therefore think that this appeal must be allowed with costs.

Order of the Court of Appeal reversed and judgment of Walton J. restored with costs here and below: cause remitted to the King's Bench Division.

Lords' Journals, August 3, 1905.

Solicitors: *Hollams, Sons, Coward & Hawksley; John B. & F. Purchase.*

[HOUSE OF LORDS.]

H L. (Sc.) 1905 *April* 11; *June* 8.

JAMES GRANT . . . . . APPELLANT;

AND

MRS. FANNY GRANT . . . . . RESPONDENT.

WILLIAM M. GRANT CALDER . . CO-RESPONDENT.

Divorce—Wife's Costs—Scottish Law.

Where the wife is successful in her defence to an action of divorce the rule of the law of Scotland is to give the wife her costs as between agent and client.

THIS appeal was against a decision of the Second Division of the Court of Session, Scotland, dated February 2, 1904, affirming the Lord Ordinary's interlocutor in an action of divorce by the husband, granting an absolvitor to the wife on the ground that it had not been proved that she had committed adultery with the co-respondent.

Asher, D.F., and *A. L. M'Clure*, for appellant.

J. Avon Clyde, K.C., Cooper, K.C., and *W. A. Fleming*, for respondent.

J. A. Welsh, for the co-respondent.

(All of the Scottish Bar.)

April 11. Their Lordships (Lords Macnaghten, Davey, James, and Lindley), (Lord Robertson dissenting) affirmed the decision of the Court below with costs, stating that the question was merely one of fact.

On June 8 a petition was argued before the Appeal Committee in respect of the respondent's costs, the appellant's agents contending that she was not entitled to them as between agent and client, owing to her suspicious behaviour.

Their Lordships (Lords Macnaghten, Davey, James, and Robertson) gave the respondent her costs as between agent and client, that being the rule in Scotland. (1)

Lords' Journals, April 11 and June 8, 1905.

Agents for appellant: *Trinder, Capron & Co., for Hagart & Burn Murdoch, W.S., Edinburgh.*

Agents for respondent and co-respondent: *Burchell, Wilde & Co., for Forbes, Dallas & Co., W.S., Edinburgh.*

(1) See *Mackenzie* v. *Mackenzie*, [1895] A. C. 384, 416; *Collins* v. *Collins*, (1884) 9 App. Cas. 205, 242.

[HOUSE OF LORDS.]

(COMMITTEE FOR PRIVILEGES.)

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1905
July 4.

In re LORD KINROSS.

Practice—House of Lords—Peer's Right to be heard at the Bar.

A barrister who is also a peer may argue as counsel on an appeal at the bar of the House of Lords, but may not appear as counsel to argue before Committees of the House, or before the House when sitting under the presidency of the Lord High Steward on a criminal case.

APPLICATION by Lord Kinross, barrister-at-law, son of the late Lord Justice General of Scotland, to be allowed to argue as counsel on appeals to the House sitting as a Court of Appeal.

The Committee for Privileges was summoned to consider the application, and the following peers attended: the Chairman of Committees (the Earl of Onslow), Earl of Halsbury L.C., Earl Spencer, Viscounts Cross and Knutsford, and Lords Ashbourne, Macnaghten, James, and Robertson.

EARL OF HALSBURY L.C. I think it right to mention the circumstances under which I have asked that your Lordships should give us your assistance. The son of the late Lord Justice General of Scotland has been called to the Bar and is a practising barrister. There is a case coming before your Lordships' House in which he is desirous, and his client is desirous, that he should appear and represent him as counsel at the bar of your Lordships' House. I did not think it was very desirable that without an appeal to your Lordships' Committee we, who are a comparatively small number practically constituting the Court of Appeal, should decide the question as to hearing him for ourselves, because although practically those who are sitting for that purpose are merely a Court of Appeal, theoretically it is your Lordships' House. Therefore I have asked your Lordships' assistance in determining what

answer should be returned to the noble Lord who desires to appear as counsel.

My Lords, I do not conceal that I am myself strongly of opinion that he ought to be allowed to appear. I think the theoretic view that he is a member of your Lordships' House and so a member of the tribunal is not one which ought to prevail in practice. The House when sitting on appeals is confined to the legal members of the House of Lords, including the Lords of Appeal who are appointed for that purpose. A Court of Appeal has been specially constituted, before which no appeal can be entertained unless three of those members are present. Theoretically I can imagine that a good many things might be said against the view which I entertain; but it seems to me that practically the question is not one which ought to create much difficulty. I do not see why a peer should be precluded from appearing before the final Court of Appeal.

Two things strike one at once with reference to the general question. In the first place, Lord Coleridge, who is a member of this House, is continually practising before the Courts, and therefore it may be assumed that there is nothing in the position of an advocate before the Courts to prevent a peer from practising at the bar. Then the question arises, Is there anything to exclude him from appearing also before the highest Court of Appeal? Whatever may be said about that now, there is no doubt that in earlier times there was not a strong partition between the Bench and the Bar. If anything is to be said about the traditions of the Bar, my impression derived from the old reports is that in the times of our early legal history a man was one day an advocate and the next day a judge. In fact, when you use the old reports for the purpose of authority, it is difficult, without making some sort of antiquarian inquiry, to ascertain whether or not the words you quote are words of authority coming from one of the judges, or whether they are merely the argument of counsel which may have been uttered the day before in his capacity as counsel, and not as a judge at all. From time to time they went from the Bench to the Bar and from the Bar to the Bench during all those years. And then, my Lords, I may refer to the present state of things in

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the Privy Council. We have a distinguished member of the House of Commons and of the Bar, Mr. Asquith, who is also a member of the Privy Council, practising before the Privy Council. It may be said that he is not a member of the Judicial Committee of the Privy Council. That is true; but it would be strange if that circumstance were to affect the question whether or not he ought to be heard as an advocate before the tribunal. It is plain that circumstances might arise any day in which the Sovereign might appoint him a member of the Judicial Committee. I only desire to make this motion in order to start the discussion, that we may receive your Lordships' help and countenance, whatever view we take of the matter, and that the noble Lord who wishes to appear should, before he formally makes his application to be heard, be informed whether he will be heard or not. I propose to move, with a view to starting the discussion: That according to the practice of the highest Court of Appeal, the House of Lords, there is no reason why a peer should not be heard as an advocate to argue questions of law before your Lordships' House.

LORD JAMES. My Lords, as one of the older members of your Lordships' Committee, I should like to say, with very great deference, that I entirely differ from the view that has been presented by my noble and learned friend, and I trust your Lordships will consider well before you accept this motion. I am not for a moment suggesting that a peer should not practise as a barrister in the Courts of law. Until the case of Lord Coleridge occurred the question had never arisen; but it appears to me that the course taken by the noble and learned Lord was perfectly justifiable. If I may say so respectfully, I think the more the members of this House associate themselves with the profession the better. In my opinion, Lord Coleridge was well within his right in practising at the bar. But that is not the question now before your Lordships. The question is whether a man who is a member of a tribunal can practise before that tribunal. If we accept this motion, that Lord Kinross should be allowed

to practise at the bar of the House, I cannot understand how we can refuse him the right to appear before Committees of the House also. I cannot see any distinction, and the very important question arises whether we shall not by giving this permission be encouraging the House of Commons to determine that its members may practise before the Committees of that House. There is a very thin partition between practising before Committees of the House and before the House generally. What is there to prevent a peer who practises before the House itself from practising before one of its Committees? And let me refer to a recent case. Three or four years ago we had a peer on his trial for a felony. If this permission is granted, what will there be to prevent a peer from being heard as an advocate at the bar and then coming in and taking part in the decision of the very case in which he has been an advocate?

My Lords, we must not forget that when we are sitting to hear appeals we are sitting as the House of Lords. According to the theory of the Constitution we are the House of Lords, determining the question as such, and whether we sit as a limited number of legal peers to hear appeals in civil causes, or as a judicial tribunal to determine the guilt or innocence of one of our peers, we are in any case the highest Court of law in the land. My noble and learned friend's motion involves this, in principle at least, that a member of this House may appear before the House and argue before it, with a right afterwards to take part in the decision. I say that would be a scandal. My Lords, we have some analogy to guide us upon the principle as to whether a member of a tribunal can practise before it or not. As your Lordships are aware, there was a time when the House of Commons decided upon election petitions by its own Committees, but in the year 1868 the determining of those petitions was placed in the hands of the judges. Then because that tribunal (the judges) reported to the House of Commons, those who had the care of the interests both of Parliament and the Bar in their hands had to consider whether a barrister who was also a member of Parliament had a right to appear before that tribunal. If I

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recollect rightly, the determination of that question was chiefly in the hands of Sir John Coleridge and Sir John Karslake, and a few months later, in the spring of 1869, I was a party to it. We determined that no member of the House of Commons should appear before an election judge, because the election judge had to report to the House, and therefore the barrister practising before him would be practising before the same tribunal of which he was a member. I may remind my noble and learned friend, who was engaged in nearly all the election petitions until he took his seat in the House of Commons in 1876, that that rule was fully accepted. Some members of the House gave up appearing on a considerable number of petitions, and we maintained the principle that a member of the House of Commons should not practise before the tribunal which would have to report to the House.

One word as to the analogy which my noble and learned friend has spoken of in respect to the Privy Council in the case of Mr. Asquith. The rule of conduct was that a barrister should not practise before the Judicial Committee if he became an ordinary Privy Councillor. Sir John Karslake, for one, entertained this view. Acting upon that rule, in 1885, when I had the honour of being made a Privy Councillor, I refused to appear before the Judicial Committee because I could not bring myself to practise before that tribunal, although there was a strong partition between the general body of Privy Councillors and the members of the Judicial Committee. That was formerly accepted and acted upon as the proper rule which should guide those who practised before the Privy Council until very recently, and although my friend Mr. Asquith has a right to do what he has done, and I have not a right or a desire to criticize him in the least, still there can be no doubt that that right was not acted upon, and had never been acted upon by any one except Mr. Asquith, in the long period which had elapsed before he chose to take that course. My Lords, for the reasons I have given I am very strongly against breaking down this barrier, which in my opinion rightly exists, preventing any member of a tribunal from practising before it, although I daresay this motion

might not in fact have a wide operation. I feel bound to express my opinion against it in the interests both of the dignity of this House and of the members of the Bar who practise before it.

LORD ASHBOURNE. My Lords, I must say the inclination of my mind is not in accord with my noble and learned friend Lord James. Nor am I impressed with his arguments, although I recognise their interest and the great fairness with which he has presented them. My noble and learned friend has used an expression to the effect that members of your Lordships' House are members of the tribunal that hears appeals, and indeed he has referred to that fact more than once. It is true only in a historical and remote sense, for in all the years that any of your Lordships now present recall no peer not learned in the law according to the technical description has attempted to take any part in a decision of your Lordships' House in legal matters. I venture to say that if, when an appeal was being heard in your Lordships' House upon a point of law, any member of the House not learned in the law sought to take part in the proceedings, those who were specially responsible for the legal business of your Lordships' House would feel compelled to animadvert very strongly upon it, if not to adjourn the hearing of the case. I can hardly imagine a step more inconvenient, more entirely opposed to constitutional usage, than for any member who had not held one of the qualifying offices which would justify him in taking part in hearing appeals to come here and seek to discuss the important questions of law which are from time to time coming before your Lordships' House. I admit, of course, that the House of Lords is the House of Lords for all purposes, and every member of it is a peer of Parliament entitled to be present on every occasion when it sits; but I cannot but think it is putting a technical point into undue prominence when you speak of every peer as being a member of your Lordship's House for the decision of important legal questions.

Then my noble and learned friend says this would be only

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introductory to wider claims, and if a peer were permitted to come and appear for a client at your Lordships' bar it would be competent for him then to appear for a client before a Committee of the House. My Lords, I am disposed strongly to question that. No doubt if he were selected by the Lord Chairman of Committees as a member of a Committee of your Lordships' House he would be entitled to sit upon that Committee. But this is not a matter of technicality; it is a matter of substance. If he sought to appear on behalf of a client before a Committee he might be a member of that Committee or a member, if not of that particular Committee, of another Committee in another room, there being no technical bar against his sitting on a Committee. I see therefore a great difference, a vital difference, between practising in your Lordships' House and appearing before a Committee, when he might have sat on that very Committee or on another Committee the day before in another room. My noble and learned friend Lord James spoke of a "thin partition." I am unable to see any thinness about the partition at all. If you get away from mere technicalities and come to substance it is an extremely thick partition. If a peer who had not held a qualifying legal office would be unable to sit here without violating your Lordships' practice as a matter of constitutional usage I do not call it a thin partition, but a substantial one—one that could only be overcome after very serious discussion, and perhaps some inconvenient interruption of the ordinary business of the House.

Then my noble and learned friend refers to an assumed analogy between what is sought on the present occasion and the action of the House of Commons in reference to election petitions. I was not myself able to follow that. It is quite true that for purposes deemed wise by Parliament the hearing of election petitions was transferred to the judges; but the report comes back to the House of Commons, and therefore every member of that House has a right, and if there was a call of the House it would be his duty, to be present at whatever proceeding might take place in reference to that report.

My Lords, I do not think the analogies and reasons mentioned by the Lord Chancellor have been displaced by what has been said by my noble and learned friend Lord James in his very interesting remarks. The practice of the Privy Council is, I think, important, and has a significant bearing on the present discussion. My noble and learned friend says that when he was made a member of the Privy Council he did not practise before that tribunal, although we all know that he was a very leading and distinguished member of the Bar. But we are aware that a very distinguished or prominent member of the Bar, also a Privy Councillor, now practises there, and no doubt to the assistance of the tribunal and the advantage of his clients. Therefore we find that the existing practice of the Judicial Committee of the Privy Council is not to question the right of the Privy Councillor to appear and argue for his clients in cases in which he may be instructed. I think that is a matter of very considerable importance when we are considering analogies. It must be borne in mind also, as was pointed out by the Lord Chancellor, that by an exercise of the Royal prerogative it might come about that any barrister practising before the Judicial Committee might be placed on that Committee itself: therefore what my noble and learned friend opposite has called a thin partition would vanish, and a Privy Councillor who was also an advocate would by the removal of that partition be sitting as a member of the tribunal on the very next day.

My noble and learned friend the Lord Chancellor has mentioned the fact of peers practising in other Courts. I think that is a matter of considerable importance. The question is not a large one, because none of us have a right to suppose, or can expect, that there would be any substantial number of peers practising their profession at your Lordships' bar or seeking to avail themselves of the right to appear there; but the fact that a peer is permitted, and as I think rightly and fairly permitted, to appear before the tribunals of this country is a fact of considerable importance. What does it mean? Assuming that he is entitled to be regarded as a member of the House of Lords, and therefore technically within the description

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of one who could hear appeals, is it not a step in the argument to find that he is allowed without question to discuss and to take part in cases which have come before tribunals lower than that of your Lordships' House, it may be on Circuit, it may be in one of the Divisions, it may be in the Court of Appeal? All *that* he does without question; and yet it is suggested—those being inferior Courts—that when an appeal from them comes up to this House he is not to be allowed to stand at your Lordships' bar to argue it; that he must remember that when your Lordships hear an appeal he is no longer in an inferior Court where he can be heard, but in a Court where he cannot be heard. My Lords, this is a new question; it has never been presented before for decision as regards the Bar of this House or its Committees. I admit that there is something in what my noble and learned friend Lord James has said: there are certainly considerations to be weighed on both sides; but I must say that the balance in my own mind is in favour of what has been said by my noble and learned friend the Lord Chancellor.

EARL SPENCER. My Lords, I am rather reluctant to say anything among a body almost entirely composed of Law Lords, but as this is a matter which affects the House at large perhaps I may have some little right to say something upon it. Probably I am the only lay peer present to-day who has sat in the House when hearing an appeal. I remember very well when I was a mere boy I was called in one morning to make a quorum, and I recollect sitting here and hearing appeals. Happily that state of things has passed away; it was certainly open to objection, and the doing away with it was in my opinion one of the best of reforms. According to the statement we have heard, not only from the Lord Chancellor and Lord Ashbourne, but from Lord James, it is well understood that of late years lay peers no longer take any part in the procedure of hearing appeals before the highest tribunal of the land.

My Lords, I have listened with the greatest care to the arguments which have been addressed to the House this

morning. I confess my sympathy is very strong in favour of making this concession to Lord Kinross. I followed the precedents and analogies which were brought forward by Lord James, and I confess I did not think that some of them exactly applied. One of the strong points he made was with regard to the Privy Council. Lord Ashbourne has met that. It seems to me that the Crown has that matter entirely in its own hands, because until a Privy Councillor is called to sit on the Judicial Committee he is not a member of the tribunals. Then comes the question of practising before Committees of this House. I think what is proposed now could hardly be a precedent for that. I at once admit that it is not right that any one pleading before a tribunal should also sit upon that tribunal as judge. No doubt any peer might sit on a Committee; but it does not follow that he would be put on a Committee by the Lord Chairman. It is not likely that he would put a legal peer upon the Committee if he has been in the habit of practising before Committees. The only precedent which certainly does throw a little difficulty in my way is the precedent of the House sitting as it did a few years ago (1), when the Lord Chancellor presided over a trial of a peer for what I may call a criminal offence. There, of course, the whole House did sit. I remember on that occasion being appealed to by several of my friends and others to make a motion; but I declined to do so, as I thought it was more right that the question should be decided by the Law Lords than by the lay peers. At the same time there we were, and I should have had a perfect right to make a motion with reference to the sentence. That is a case in which there might be a difficulty. Lord James was present there, I think. I was going to throw out this suggestion: Is it possible that in passing the resolution in the Committee of Privileges or in the House that Lord Kinross may practise to confine it to your Lordships' House when sitting as the highest Court of Appeal? If that could be done, it would sweep away the only difficulty I have.

EARL OF HALSBURY L.C. My motion was so intended.

(1) [1901] A. C. 446. Trial of Earl Russell.

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LORD MACNAGHTEN. My Lords, I am very glad that the Lord Chancellor has submitted this question to the Committee for Privileges, and I am very glad to hear the opinion that has been expressed by a member of the House who is not a member of the legal tribunal. I entirely agree with everything the Lord Chancellor has said. One consideration which weighs practically with me a good deal—possibly because I spent a good part of my life at the bar—is this. If you recognise that a barrister may practise before other tribunals you place him at a great disadvantage if you say he may not appear here, and you place his clients at a great disadvantage also, because they may have his services in the Court of first instance and up to the Court of Appeal, and if you say that he may not follow the case when it comes by appeal to this House you are placing both him and his clients at a very great disadvantage.

VISCOUNT KNUTSFORD. As we were summoned here, perhaps I may be allowed to say a very few words to express my complete concurrence in the views which have been stated by the Lord Chancellor and the Lord Chancellor of Ireland. It seems to me that we are dealing in this case with a matter of substance and not of technicality. There may be difficulties, but substantially there can be no doubt that the Lord who now seeks to appear before you would have no right, and could under no circumstances have a right, to sit also as a member of the Court in the case; therefore he would not be pleading before a Court in which he could be a judge. That seems to me to be substantially the view of the question we ought to adopt. With the view entertained by Lord Spencer as to defining more clearly in the resolution the particular point we are engaged upon, I desire to express my hearty concurrence, and I understand that the Lord Chancellor agrees to that suggestion.

LORD ROBERTSON. My Lords, I am not one of the habitual orators of this House, and therefore you will not be surprised to know that I merely rise to put one particular point. It is this: I do not see any technical difficulty at all in what is pro-

posed, and for this reason. The suggestion is made that the noble counsel, having pleaded upon his case, could constitutionally come into the House and vote on that very case. That is not so. No man is entitled to sit and take part in a decision in this House or anywhere else unless he has heard the cause, and heard it as a judge. Now the bar is outside the House of Lords altogether. Therefore a peer who has heard the cause at the bar has not heard the cause. Consequently that difficulty entirely vanishes. I fully concur with the view taken by Lord Spencer.

LORD JAMES. Of course I accept the view that has been expressed almost unanimously, adding as a rider to the motion that the resolution is not intended to apply to the appearing of barristers who are peers before the Committee of this House, or before the House when sitting as a full Court in a criminal case.

EARL OF HALSBURY L.C. With reference to the case of Lord Russell it was not a trial before this House. It was a trial before the Lord High Steward of England, the House sitting as the judges of fact. It was not a sitting of the House within the language of my resolution. The resolution I propose is: "That according to the present practice of the House of Lords there is no reason why a peer should not be heard as an advocate to argue questions of law before your Lordships' House; but this resolution is not intended to apply to the appearing of barristers who are peers before Committees of this House."

LORD JAMES. Could we add such words as, "or before this House when sitting for the trial of criminal cases"?

LORD ASHBOURNE. "Or when sitting under the presidency of the Lord High Steward on a criminal case"?

VISCOUNT CROSS. My Lords, I agree subject to the remarks made by Lord Spencer; and now that that point has been met. I entirely agree with the motion.

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REPORT FROM THE COMMITTEE FOR PRIVILEGES.

"That according to the present practice of the House of Lords there is no reason why a peer should not be heard as counsel on an appeal at the bar of this House; but that this resolution is not intended to apply to the appearing of barristers who are peers before Committees of this House, or before this House when sitting under the presidency of the Lord High Steward on a criminal case."

Made and agreed to, and resolved accordingly.

Lords' Journals, July 4, 1905.

[HOUSE OF LORDS.]

H. L. (Sc.) 1905 *July* 28.

SIR PATRICK H. WATSON . . . . . APPELLANT;

AND

MRS. J. P. JONES OR M'EWAN . . . RESPONDENT

ET È CONTRA.

SIR PATRICK H. WATSON . . . . . APPELLANT;

AND

JAMES JONES . . . . . RESPONDENT.

Slander—Evidence—Privilege—Statement made in Witness-box and in preparing Proof.

The privilege which protects a witness from an action of slander in respect of his evidence in the box also protects him against the consequence of statements made to the client and solicitor in preparing the proof for trial.

APPEAL from the Second Division of the Court of Session, Scotland. (1)

The appellant was Sir Patrick H. Watson, a Doctor of Medicine; and the respondents were respectively Jessie Prentice Jones or M'Ewan, wife of Thomas M'Ewan, and her father James Jones. The ground of the actions was that the

(1) (1904) 42 S. L. R. 213.

appellant Sir Patrick Heron Watson, while being examined as a witness in an action of separation brought by the respondent Jessie M'Ewan, made certain statements which the respondents alleged were slanderous. The respondent Jessie M'Ewan alleged that the statements made in the witness-box had been, prior to the trial, and with a view to giving evidence, communicated by the appellant to her husband Thomas M'Ewan, his agent and his counsel. The Lord Ordinary and their Lordships of the Second Division were unanimously of opinion that no action would lie against the appellant for the statements made in the witness-box; but their Lordships (Lord Young dissenting) allowed an issue with reference to the information previously given to the husband's law agent. The main question raised in this appeal was whether the averment of the respondent Jessie M'Ewan that the statements made in the witness-box were previously communicated to her husband and his agent and counsel formed a ground of action against the appellant Sir Patrick H. Watson.

A similar action of damages was raised by James Jones, the manager of the Dalmeny Oil Works and the father of the respondent Jessie M'Ewan, against the appellant arising out of the same subject-matter. That was the second appeal. In the first appeal there was also a cross-appeal by the respondent Jessie M'Ewan as to an issue not allowed by the Court of Session.

The facts of the alleged slander were shortly these. In October, 1901, the respondent Jessie M'Ewan was desirous of obtaining a separation from her husband on the ground of alleged cruelty, and for this purpose she sent for the appellant with a view of acquiring his testimony as to her broken-down condition, caused, as she alleged, by her husband's ill-usage. Subsequently the action of separation and aliment was brought by the respondent Jessie M'Ewan against her husband. It was decided against her by the Lord Ordinary on December 8, 1903. The action was defended by her husband, and a proof was led on July 14 and 15, October 22, 23, 24, and on November 5 and 6, 1903. Several witnesses were examined and gave evidence on her behalf. On October 21, 1903, the appellant,

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together with other doctors, made an examination of the respondent Jessie M'Ewan on her husband's behalf. Shortly after making this examination the appellant reported the result of his examination, his opinion of the case, and the nature of the evidence which he was prepared to give to her husband's agents, Messrs. Millar, Robson & M'Lean. He also at or about the same time gave information to the said parties as to certain matters which he alleged he had ascertained as the result of his prior examination of the respondent Jessie M'Ewan in October, 1901. At the same time he shewed or communicated to the respondent's husband and to Mr. Robson, S.S.C., a partner of the said firm, and to the counsel engaged by the respondent's husband, the contents of certain private notes made by him at the time of his previous examination of the respondent. On October 24, 1903, a date which had been fixed for hearing the remaining evidence in the case, he was examined as a witness for the respondent's husband. In the course of his evidence in the witness-box he deponed to certain matters which he alleged that he had learned on the occasion of his professional visit in October, 1901, to the respondent Jessie M'Ewan, who was then in a state of pregnancy, and produced his private note-book containing the notes before referred to alleged by him to have been made at the time. These notes referred to the taking of morphia by the respondent Jessie M'Ewan, and concluded as follows:—

"Advised should be sent to a nursing home till after her confinement over, to wean her from morphia and separate her and her husband, and also her own family, till after the birth of the child. This view not pleasing to patient nor to her father (who has married a second wife), and it seems they are all bent upon inducing premature labour, so as to free the patient of any permanent reminder of this marriage, and, if possible, obtain a separation."

The notes were read or the contents of the notes were stated in Court by the appellant in the course of his evidence. The respondent Jessie M'Ewan averred that, in shewing to the said parties the notes before referred to or communicating to them the contents thereof, and voluntarily giving evidence with

regard to said matters, the appellant acted wrongfully and in violation of the duty of secrecy which he owed to her, and that in consequence she had been wounded in her feelings and injured in her character, and suffered loss and damage, which she estimated at the sum of 2500*l.*, which was the sum first concluded for her in the summons. She further averred that the notes contained a slander upon her; that the statement was intended to mean that the respondent Jessie M'Ewan had indicated to the appellant her desire at the time of his visit in October, 1901, criminally to procure abortion; that she had endeavoured to obtain his assistance and co-operation to accomplish this object; and that her sole motive in so doing was to free herself of any permanent reminder of her marriage with her husband. She averred that in consequence of the said statement she had sustained serious loss and damage, and had suffered in her character and feelings, and estimated her loss at the sum of 2500*l.*, which was the sum secondly concluded for.

In her action against the appellant the pursuer Jessie M'Ewan proposed four issues, two of which were based upon evidence given by the appellant as a witness in the box in the action between her and her husband. These latter the Lord Ordinary rejected. The two issues allowed by the Lord Ordinary were as follows (the second issue, subject to amendment, was allowed by the Court of Session):—

"(1.) Whether on or about 22nd October, 1901, the pursuer employed the defender as her private and confidential medical adviser, to advise her as to her state of health and in the matter of an action of judicial separation proposed to be instituted by the pursuer against her husband Thomas M'Ewan, and in pursuance of said confidential employment communicated to the defender the evidence proposed to be led on her behalf, and submitted herself, on or about 24th October, 1901, to an examination by the defender at her father's house in Dalmeny; and whether the pursuer, having raised an action of separation and aliment against the said Thomas M'Ewan, which was defended by him, the defender, in breach of such confidential employment, on or about 22nd, 23rd, or 24th

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October, 1903, voluntarily disclosed to the said Thomas M'Ewan, to William Robson, S.S.C., Edinburgh, his law agent in said action, and to the counsel engaged therein on his behalf, or to one or more of them, matters relative to the pursuer and her state of health ascertained in the course of said confidential employment, and the nature and result of the examination of the pursuer made as aforesaid, to the loss, injury, and damage of the pursuer. Damages laid at 2500*l*."

"(2.) Issue (as altered in the Second Division): Whether on or about 22nd, 23rd, or 24th October, 1903, the defender falsely and calumniously stated to the said Thomas M'Ewan, to William Robson, S.S.C., Edinburgh, the law agent acting for the said Thomas M'Ewan in an action then pending between the said Thomas M'Ewan and the pursuer, and to the counsel engaged in said action on behalf of the said Thomas M'Ewan, or to one or more of them, of and concerning the pursuer, that in October, 1901, at the time when the defender had professionally attended and made an examination of the pursuer, who was then pregnant, the pursuer was bent upon inducing premature labour, so as to free her of any permanent reminder of her marriage with the said Thomas M'Ewan, meaning thereby that the pursuer was desirous criminally to procure abortion, or used words of like import and effect, to the loss, injury, and damage of the pursuer."

On November 18, 1904, the Second Division disallowed the first of the above issues, and to that extent altered the Lord Ordinary's interlocutor and quoad ultra adhered, and approved of the remaining issue as altered. (1)

The cross-appeal was against the disallowance of the first issue. In the second appeal the issues were almost the same.

July 28. *Campbell, K.C.*, and *Younger, K.C.* (of the Scottish Bar), for the appellant in both appeals. The information given to the law agent of the husband before going into the witness-box was strictly reserved to what the witness was prepared to prove in Court, and was absolutely privileged. This privilege is founded on grounds of public policy, in order to protect

(1) 42 S. L. R. 213.

witnesses from being harassed by actions of damages, and thereby deterred from speaking with that free and open mind which the administration of justice demands: *Dawkins* v. *Lord Rokeby* (1); *Williamson* v. *Umphray and Robertson* (2); *Munster* v. *Lamb* (3); *Rome* v. *Watson* (4); *Seaman* v. *Netherclift* (5); *Hassan* v. *Paterson.* (6)

Haldane, K.C., and *Charles D. Murray* (the latter of the Scottish Bar), for the respondents in both appeals. The appellant was retained by the respondent Mrs. M'Ewan as a medical man, received a fee, and came to see her for the purpose of her litigation. The information he obtained was for her benefit. When a witness is consulted and forms an opinion, that opinion is the property of the client or person who employs him, and he is not at liberty to give it to the other side. So if a solicitor acquires knowledge of a flaw in his client's title, he is bound not to let the other side know of it. Here the appellant, in making disclosures to the respondent's husband, did what was contrary to his duty. There is no doubt that a witness is protected from the consequence of going into the witness-box; but it is clear the appellant is not protected for what he did outside the box: *Anderson* v. *Bank of British Columbia* (7); *Friend* v. *London, Chatham and Dover Ry. Co.* (8)

[They also cited *Lamb* v. *Evans* (9); *Gibb* v. *Barron* (10); *Maloney* v. *Bartley.* (11)]

Campbell, K.C., in reply.

EARL OF HALSBURY L.C. My Lords, when one examines these two appeals, I think it is impossible to say that any different question arises in the one from that which arises in the other. The same judgment is applicable to both.

When one examines with care the different allegations made in the condescendences and the answers, I do not think any

(1) (1875) L. R. 7 H. L. 744, 755, 756.
(2) (1890) 17 R. 905, 910, 911.
(3) (1883) 11 Q. B. D. 588.
(4) (1898) 25 R. 733.
(5) (1876) 2 C. P. D. 53.
(6) (1885) 12 R. 1164.
(7) (1876) 2 Ch. D. 644, 652, 658.
(8) (1877) 2 Ex. D. 437.
(9) [1893] 1 Ch. 218, 229.
(10) (1859) 21 D. 1099.
(11) (1812) 3 Camp. 210.

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question arises as to the confidential nature of the employment between patient and medical man. I do not propose to express any opinion upon what would be the legal determination of that question if it arose. It may be that it raises very serious and difficult questions, and I certainly am not disposed to express an opinion either way in respect of questions which upon other grounds have no difficulty at all in their solution. The broad proposition I entertain no doubt about, and it seems to me to be the only question that properly arises here; as to the immunity of a witness for evidence given in a Court of justice, it is too late to argue that as if it were doubtful. By complete authority, including the authority of this House, it has been decided that the privilege of a witness, the immunity from responsibility in an action when evidence has been given by him in a Court of justice, is too well established now to be shaken. Practically I may say that in my view it is absolutely unarguable—it is settled law and cannot be doubted. The remedy against a witness who has given evidence which is false and injurious to another is to indict him for perjury; but for very obvious reasons, the conduct of legal procedure by Courts of justice, with the necessity of compelling witnesses to attend, involves as one of the necessities of the administration of justice the immunity of witnesses from actions being brought against them in respect of evidence they have given. So far the matter, I think, is too plain for argument.

But then comes the question which, so far as I know, has been raised for the first time in this case. The ingenious suggestion has been made that although it is true that a witness is protected from an action in respect of evidence actually given in a Court of justice, yet no such protection exists in respect of his attendance before the solicitor at what is called apparently in Scottish law his precognition—what we call the interview between the intended witness and the solicitor who takes from him what we call the proof—that is to say, reduces to writing the evidence which the witness is about to give. One very serious element of difficulty which those who insist upon such a liability have to meet is manifest—namely, that in the whole course of the diligent inquiry that the learned counsel on both

sides have made into this matter they have not found that any such liability has ever been sought to be established before. So far as I know personally in my experience no such question has ever arisen. The learned judges who have allowed these issues have done so apparently for the first time in this case.

It appears to me that the privilege which surrounds the evidence actually given in a Court of justice necessarily involves the same privilege in the case of making a statement to a solicitor and other persons who are engaged in the conduct of proceedings in Courts of justice when what is intended to be stated in a Court of justice is narrated to them—that is, to the solicitor or writer to the Signet. If it were otherwise, I think what one of the learned counsel has with great cogency pointed out would apply—that from time to time in these various efforts which have been made to make actual witnesses responsible in the shape of an action against them for the evidence they have given, the difficulty in the way of those who were bringing the action would have been removed at once by saying, "I do not bring the action against you for what you said in the witness-box, but I bring the action against you for what you told the solicitor you were about to say in the witness-box." If that could be done the object for which the privilege exists is gone, because then no witness could be called; no one would know whether what he was going to say was relevant to the question in debate between the parties. A witness would only have to say, "I shall not tell you anything; I may have an action brought against me to-morrow if I do; therefore I shall not give you any information at all." It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice—namely, the preliminary examination of witnesses to find out what they can prove. It may be that to some extent it seems to impose a hardship, but after all the hardship is not to be compared with that which would arise if it were impossible to administer justice, because people would be afraid to give their testimony.

My Lords, the hardship to which I refer is this: that

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although when a witness does give evidence which is wilfully false you can indict him for perjury, on the other hand, if he makes the same statement not upon oath to a person taking down the evidence he is prepared to give, it seems to be very difficult to devise anything that would bring him to justice for that false statement. The answer, of course, dealing with it as a matter of convenience and indeed of necessity for the administration of justice, I suppose, is this: unless he does give evidence in a Court of justice, in which case he can be indicted for perjury if his evidence is wilfully false, nobody knows anything about it—it slumbers, I suppose, in the office of the solicitor, and nobody hears or cares anything about it. Practically, I think that would be the answer. But whether that be a good answer or not, what seems to me to be an overwhelming consideration in the determination of this case is that a witness must be protected for his preliminary statement or he has no protection at all, and that there is that protection established is, as I have already said, beyond all possibility of doubt.

Now, my Lords, the reason why I think that this is the only question that arises is this: It is true that the gentleman sued is an eminent medical man, and that there is a mixture of the points both in the condescendences and in the answers which has rather tended to confusion; but if one comes to look with care at the different forms of procedure one sees that everything that passed, everything that is alleged to have passed, passed between the defender and those who were engaged in the legal business. The communication complained of was no communication to strangers—to persons outside the litigation. The communication such as it is was made to the counsel and to the solicitor who was taking down the evidence. Under those circumstances it seems to me that it comes within the whole mischief of the supposed liability of a witness for what he had stated. I do not care whether he is what is called a volunteer or not; if he is a person engaged in the administration of justice, on whichever side he is called his duty is to tell the truth and the whole truth. If he tells the truth and the whole truth, it matters not on whose behalf

he is called as a witness; in respect of what he swears as a witness he is protected—that cannot be denied—and when he is being examined for the purpose of being a witness he is bound to tell the whole truth according to his views, otherwise the precognition, the examination to ascertain what he will prove in the witness-box, would be worth nothing.

Under those circumstances, my Lords, it appears to me that there is but one point in this case, namely, whether the preliminary examination of a witness by a solicitor is within the same privilege as that which he would have if he had said the same thing in his sworn testimony in Court. I think the privilege is the same, and for that reason I think these judgments ought to be reversed, and I move accordingly.

LORD JAMES. My Lords, I concur in the result which has been arrived at and for the reasons which have been expressed by my noble and learned friend on the Woolsack.

LORD ROBERTSON. My Lords, so do I.

Campbell, K.C. I understand your Lordships to intend that we should get the costs of the appeal.

EARL OF HALSBURY L.C. Yes. I think in this case the proper order is to remit it to the Court of Session, to dismiss the action with costs; and in the cross-appeal we dismiss the appeal with costs, and the order will be the same in the case of *Watson* v. *Jones*.

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Ordered and adjudged, that the interlocutors, in part complained of in the original and cross appeals, be, and the same are hereby, discharged, and that the cause be, and the same is hereby, remitted back to the Court of Session in Scotland, with a direction to dismiss the action and to find the appellant in the original appeal (defender below) entitled to expenses in the Court of Session: And it is further

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ordered, that the said cross-appeal be, and the same is hereby, dismissed this House: And it is further ordered, that the respondent in the original appeal (pursuer below) do pay, or cause to be paid, to the said appellant (defender below) the costs incurred by him in respect of the said original and cross appeals to this House.

WATSON *v.* JONES.

Ordered and adjudged, that the said interlocutors, in part complained of in the said appeal, be, and the same are hereby, discharged, and that the cause be, and the same is hereby, remitted back to the Court of Session in Scotland, with a direction to dismiss the action and to find the appellant (defender below) entitled to expenses in the Court of Session: And it is further ordered, that the respondent do pay, or cause to be paid, to the said appellant the costs incurred by him in respect of the said appeal to this House.

Lords' Journals, July 28, 1905.

Agents for appellant in both appeals: *A. & W. Beveridge, for J. P. Watson, W. S., Edinburgh.*

Agents for respondents in both appeals: *Neish, Howell & Haldane, for Drummond & Reid, W.S., Edinburgh.*

[HOUSE OF LORDS.]

MUSSELBURGH REAL ESTATE COMPANY, LIMITED, AND ANOTHER . . } APPELLANTS;

AND

PROVOST, &c., OF MUSSELBURGH AND ANOTHER . . . . . } RESPONDENTS.

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1905
July 31.

Harbour—Boundary—"Precincts"—Removal of Sand from Foreshore—Construction of Statute—Musselburgh Harbour Act, 1840 (3 & 4 *Vict. c. lxxiii.*), *ss.* 2, 49, 76.

By s. 2 of the Musselburgh Harbour Act of 1840 the word "harbour" shall be understood to mean the "harbour of Fisherrow," and shall include the whole precincts thereof as after specified. By s. 76 the said harbour shall be deemed to extend "along the shore" from the Magdalena Burn on the west to the Ravenshaugh Burn on the east, and to seaward to the extent of 100 yards beyond low-water mark opposite to the shore between the aforesaid burns. The distance between the two burns was two miles.

By s. 49 it shall not be lawful for any person to dig or take away from the said harbour or its precincts any sand, gravel, shingle, or stones except from such place or places as shall from time to time be appointed by the harbour commissioners. In an action by the harbour commissioners against persons who were proprietors of part of the foreshore between the two burns to restrain them from digging sand, &c.:—

Held, affirming the decision of the Second Division of the Court of Session, that the harbour and its precincts included the whole foreshore between the two burns, and that the defenders were not entitled to remove sand from their land without the authority of the harbour commissioners.

Attorney-General v. *Tomline*, (1880) 14 Ch. D. 58, followed.

APPEAL from the Second Division of the Court of Session. (1) The appellants were the Musselburgh Real Estate Company and John Downie. The respondents were the provost and magistrates of the burgh of Musselburgh, commissioners of the harbour of Fisherrow. What is known as Fisherrow is the portion of Musselburgh on the west side of the river Esk. The appellants were the owners of two properties situate on the sea front within the burgh known as Rosehall and Mackinlay Park. The former is situate to the west

(1) (1903) 5 F. 387.

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of the harbour piers; the latter is situate to the east of the harbour piers and near the mouth of the river Esk. The shore ex adverso of both properties lies between the said Magdalena Burn on the west and the said Ravenshaugh Burn on the east. The appellants claimed to be owners of the foreshores ex adverso of the two properties, and they further claimed to be entitled, in virtue of such ownership, to dig or take away from the foreshores sand, gravel, shingle, or stones. The sea between the two above-mentioned burns recedes at ebb tide a long way beyond the seaward end of the harbour piers, leaving the ground dry there at low water.

By s. 2 of the Musselburgh or Fisherrow Harbour Act it is (inter alia) enacted that where the word "harbour" is used in the Act the same shall be understood to mean the "harbour of Fisherrow," and shall include the whole precincts thereof as after specified, and the piers, quays, wharves, and other works presently existing, or which are hereby authorized to be made or maintained.

The 76th section of the said Act enacts that for the purposes of this Act, and for no other purpose whatever, the said harbour shall be deemed to extend along the shore from the Magdalena Burn on the west to the Ravenshaugh Burn on the east, and to seaward to the extent of 100 yards beyond low-water mark, opposite to the shore between the aforesaid burns. By the 78th section it is further enacted that this Act shall be deemed and taken to be a public Act, and shall be judicially taken notice of, as such, by all judges, justices, and others.

By s. 49 is enacted that it shall not be lawful for any person (inter alia) to dig or take away from the said harbour or its precincts any sand, gravel, shingle, or stones for ballast or any other purpose, except from such place or places as shall from time to time be appointed for that purpose under the authority of the said commissioners under a penalty of 5*l.* for every offence.

By s. 67 power is conferred on the harbour commissioners to make by-laws for executing the powers of the Act.

In pursuance of this power the commissioners have from time to time made and have regularly enforced by-laws pre-

scribing the portions of the shore between the said burns and within the limits of the harbour, as defined by s. 76, from which sand, gravel, shingle, or stones may be removed.

The appellant Downie was a contractor in Musselburgh, and claimed that he was, under authority of the other appellants, entitled to dig or take away sand, gravel, shingle, or stones from said foreshores unaffected by the provisions of the said Fisherrow Harbour Act or said by-laws.

In consequence of the claims made by the appellants, the respondents raised against them the present action, which concluded (1.) for declarator that the harbour of Fisherrow, as defined by the 76th section of the Fisherrow Harbour Act for the purposes of said Act, included the whole foreshore ex adverso of the said properties of Mackinlay Park and Rosehall, and that the said harbour extended landwards ex adverso of these properties to high-water mark of ordinary spring tides on the shore adjacent to or ex adverso of the said properties; and (2.) that the appellants were not entitled to dig or take away from said foreshore any sand, gravel, shingle, or stones except from such place or places as might from time to time be appointed for that purpose under the authority of the respondents as harbour commissioners under the Act.

On November 25, 1902, the Lord Ordinary (Lord Low) granted a decree in terms of the summons. Against this judgment the appellants reclaimed; and on January 23, 1903, the Second Division adhered to the interlocutor of the Lord Ordinary. (1)

July 18, 25, 31. *S. C. Rankine* and *Scott Dickson, L.A.*, for the appellants. The subject-matter of s. 49 shews that it was limited to the harbour proper, and that it did not refer to the space of two miles on which the levying of harbour dues applied. The section cannot according to the rules of statutory construction be construed to give a power to prevent the removal of sand, &c., from the foreshore by the owners of such foreshore. The absence of any provision for compensation is in favour of this construction; for the Legislature under an

(1) 5 F. 387.

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Act providing for the execution of public works never takes away the slightest private right without providing compensation for that right: see Lord Bramwell L.J. in *Wells* v. *London, Tilbury and Southend Ry. Co.* (1) The wide bounds given in the Act were given, not for physical protection of the harbour, but for protection of the harbour as a landing-place for goods and the payment of dues, &c.: *Magistrates of Campbeltown* v. *Galbreath* (2); *Magistrates of Edinburgh* v. *Scot.* (3) The taking of sand or gravel from the shore for ballast is one of the common uses of the shore vested in the Crown for the public benefit: Rankine on Land Ownership, p. 236; *Agnew* v. *Lord Advocate.* (4) The regulation of this right in the public is what was intended by s. 49, and not the invasion of private rights. Again, the purpose of s. 76 was to define the limits over which the right of harbour extended for levying dues. The corporation of Musselburgh are also sellers of sand, and this is the real reason of the prohibition.

[They also cited, on the alleged difference between the laws of England and Scotland on the landward limits of the foreshore, *Bowie* v. *Marquis of Ailsa* (5), *Smith* v. *Earl of Stair* (6), *Lord Advocate* v. *Clyde Navigation Trustees* (7), Bell's Prin. 641, and the English case of *Attorney-General* v. *Chambers.* (8)]

Salvesen, S.-G. for Scotland, and *Haldane, K.C.* (with them *Francis Watt*), for the respondents. There is no question of the confiscation of proprietary rights. The harbour commissioners have the right from time to time to forbid the proprietors of the foreshore from removing sand from certain specified portions of the foreshore. This right was given to the harbour commissioners for the protection of the harbour works, and nothing is more common in Acts of Parliament of this nature than provisions for the abridgment or regulation of private rights of property for the general benefit of the whole community. The harbour commissioners have made by-laws

(1) (1877) 5 Ch. D. 126, 130.
(2) (1844) 7 D. 220.
(3) (1836) 14 S. 922, 934.
(4) (1873) 11 M. 309, 330.
(5) (1887) 14 R. 649.
(6) (1849) 6 Bell's App. 487; appeal in *Officers of State* v. *Smith*, (1846) 8 D. 711.
(7) (1891) 19 R. 174.
(8) (1854) 4 D. M. & G. 206.

fixing places from which sand can be taken. It so happens that the magistrates have land there, and do remove sand and sell it; but the appellants also have land there from which they can take sand. The contention of the appellants is that every proprietor of foreshore can take sand in any quantity; but s. 49 is against that contention. The respondents' only object is to protect the harbour works. In 1840, when the harbour was constructed or extended, the proprietors of the foreshore may have been bought off or Parliament may have confiscated some part of their absolute private rights; for Parliament often takes away private rights when it is for the public benefit: *Milne Home* v. *Allan* (1); *Carswell* v. *Nith Navigation Trustees.* (2)

In contrast to the opinion in *Wells* v. *London, Tilbury and Southend Ry. Co.* (3), see Bowen L.J. in *London and North Western Ry. Co.* v. *Evans.* (4)

[THE EARL OF HALSBURY L.C. mentioned *Attorney-General* v. *Tomline.* (5)]

The appellants contend that this ground is not within the harbour; but "precincts" is the limit given by the Act, and all that is inclosed within the deviation defined in the Act must be taken to be the "precincts." Sect. 76 throws light upon what is meant by the expression "precincts"; and s. 49, dealing with the word "precincts," shews that it must include land within the bounds set out in s. 76.

Looking at the fact that the subject dealt with by the Act is a harbour together with its various incidents, the definition in s. 76 must be intended to include the foreshore over which the sea regularly flows and on which the piers are built. As to the extent of ground protected, the landward limit of the statutory harbour must be held to be the landward limit of the foreshore.

It is settled law in Scotland that the landward limit of the foreshore is the high-water mark of ordinary spring tides, and not an average of the medium high tides between the spring

(1) (1868) 6 M. 189.
(2) (1878) 6 R. 60, 65.
(3) 5 Ch. D. 126, 129.
(4) [1893] 1 Ch. 16, 27.
(5) 14 Ch. D. 58.

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and the neap tides, as contended for by the appellants: Stair, 2. 1. 5; Bell's Prin. 641; *Officers of State* v. *Smith.* (1)

Scott Dickson, L.A., in reply.

EARL OF HALSBURY L.C. My Lords, in this case I confess I have not been able to entertain any doubt that the judgment of the Court below is right, and ought to be affirmed.

It appears to me that the provisions of the statute are too plain to raise any ambiguity. If one thinks that the words "the precincts" require exposition, they are in my opinion explained by the statute itself. It is clear from what has been said that the statute does draw a distinction between two different areas—one is the harbour and the other is the precincts—and while it prohibits any person "to throw any ballast dirt ashes rubbish shingle sand stones and other things into the said harbour, or to do any other act matter or thing to prejudice or injure the same or any part thereof," it also, as a separate part of the section, and distinguishing between the harbour and what it then deals with, prohibits any person "to dig or take away from the said harbour or its precincts any sand gravel shingle or stones for ballast or any other purpose except from such place or places as shall from time to time be appointed for that purpose under the authority of the said commissioners."

My Lords, it is said by the statute itself that the precincts are defined in the statute. Now, unless the limits of a mile on each side of the harbour are the precincts referred to, there is no such definition as the statute itself alleges to exist in it, the inference from which is that those must be the precincts. It is manifest also, I think, when one looks at the language of the statute, that whether or not the framers of the statute were right in their view, it was intended to prohibit, except with the permission of the commissioners, to whom discretion was entrusted, anybody—"any person," to use the language of the statute—taking away sand, gravel, shingle, or stones from somewhere other than the harbour itself, and if it had been intended only to protect what I have described as the

(1) 8 D. 711.

immediate vicinity of the harbour, it was easy to say so, or to say, "so near the harbour as shall be injurious to its foundations" or what not; instead of which the statute uses the word "precincts," which it professes to define, and makes those precincts extend for a mile on each side of the harbour. It seems to me that in order to construe it as the learned Lord Advocate would have it construed, you must read into the statute words which are not there; and indeed he has not denied that that is so. That is the first objection, and it appears to me to be a very cogent one, to construing the section as he suggests, that you must introduce words which are not there.

Now, my Lords, it is said, and I think justly said, that it is contrary to the policy of Parliament to take away rights—to give anything in the nature of property to others without giving compensation for it. But I think, on the other hand, it must be frankly admitted that where you are dealing with public necessities and public security, Parliament does sometimes do that. As it has been pointed out, it does it with respect to roads, and I think it does it with respect to harbours also. This is one of those provisions which must be construed in connection with the particular subject-matter with which Parliament was then dealing. It might well be that in the view of Parliament, although the giving of these rights, not a proprietary right at all, but a right to prohibit something which in their view would interfere with the harbour, might to some extent restrain the complete liberty of the proprietors in respect of the use of that which was their own property, and prevent the proprietor of the shore taking away his sand, yet, on the other hand, the construction and maintenance of the harbour would in itself be an advantage to the adjoining proprietors. One cannot doubt that it would add to the value of their adjacent land; and it might well be that, in view of that additional value and the advantage conferred upon their land, Parliament would take away, not absolutely their property, but the right of taking sand from any part within these two miles. But even that right is not absolutely taken away,

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for discretion is confided to the commissioners, so that they may permit sand to be taken if they think right. Parliament has confided a discretion to them in the view that, as they are the persons who are interested in the maintenance of the harbour, nothing would be permitted by them which would interfere with the security which that harbour is intended to afford to all vessels frequenting that port.

Therefore, my Lords, it seems to me that the only thing we have to do with is the construction of the 49th section. I do not understand why we should extend our inquiries to a wider field than that mere question. Neither the pleadings nor indeed the facts as they are put before us in this case appear to me to raise any other question than these: First, What are the precincts? The answer to that I have already given—namely, those that are indicated by the statute. If they are not those, there are none other, and yet the statute says there are precincts indicated in the statute. Secondly, when the question of public advantage is considered, it seems to me to displace the argument—I admit a very cogent one very often—that no compensation is provided for the proprietors. That objection is answered, as I endeavoured to answer it, by saying that Parliament may have considered the advantage conferred as equivalent to the disadvantage enforced upon them. But really the whole truth, in my view, is that the statute is plain and unambiguous, and I cannot and will not introduce words into the statute which are not there. I must read the statute according to its plain and simple meaning, and, so construing it, I think the judgment of the Court of Session is right, and I move your Lordships, therefore, that the interlocutors be affirmed and the appeal dismissed with costs.

LORD ASHBOURNE. My Lords, I concur entirely with the views which have been expressed by my noble and learned friend on the Woolsack.

The case has been very fully and very ingeniously argued, and our attention has been directed to every syllable of the statute which has the slightest relevancy to the subject-matter,

and also the by-laws have been prayed in aid, and we have been asked to consider them. It is quite right that our attention should have been so directed to these matters; but after all the entire question comes back to what is the construction of s. 49. If the question had been argued at even greater length than it was, legitimately, presented to us, it would always come back to that question. The by-laws can give no substantial assistance here in arriving at any conclusion in respect of the matter before us. They may shew the opinions from time to time held as to how the discretion should be exercised by those who were responsible for making those by-laws, but the by-laws get their authority from, and their origin must be found in, s. 49; if they are suggested to be incomplete, the answer must always be given, "We will try again under the power and discretion as vested in us by s. 49."

When one comes to s. 49, one finds that it is about as clear a section as was ever framed by the Legislature. It is absolutely distinct and unqualified in all its terms. If one is not to place upon s. 49 the meaning which was placed upon it by the Lord Ordinary in his clear and well-considered judgment, it is only by praying in aid the possible introduction of other topics, other considerations, and other words. Of course that is not a legitimate way of interpreting any Act of Parliament. I therefore set aside the by-laws as throwing no substantial light, giving no assistance to us, in construing s. 49, and I look entirely to the construction that is to be given to the clear words of the section, the one important section, that has to be construed upon the present occasion.

The Act was passed as far back as the year 1840; its sections shew that notices must have been given to the parties concerned that there were plans and books of reference which it is stated comprised actually the name of one of the Lord Advocate's clients. There are no people now to tell us exactly what occurred on that occasion, but I assume that the passing of the Act of Parliament was a matter of very common knowledge, and that the parties interested in it had every opportunity

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of considering and knowing and being thoroughly acquainted with all that was being done. That being so, the Act of Parliament was passed, comprising in its terms the section which has been so often referred to. Every person interested had every possible opportunity, I assume, of considering the bearings and the possible constructions which might be given to the operations under that section. That being so, the presentation of the case to us by the Lord Advocate and his learned and very able junior colleague is this: that no matter how clear, no matter how unqualified it may be, it is to be read as excluding, by the introduction of words which are not found there, a class of persons who are to be regarded as private owners; their contention is that it must be so read that it will not interfere with or in the slightest degree disturb any of the discretion that might be exercised by a private owner. On the other hand this must be borne in mind—that, as has been pointed out to us upon the other side with great force, the statute is clear and unqualified—that it does not suggest the possibility of the introduction in the construction of any words or meaning which are not to be found upon the face of it. I think there is immense weight in the words quoted to-day from the judgment of Bowen L.J. in the case of the *London and North Western Ry. Co.* v. *Evans.* (1) Here we find words which are clear and distinct. We find that the Legislature, knowing what it was doing, thought proper to introduce those words—they are not words which expropriate—they are words which give a discretionary power of control and management in the exercise of what we must conceive to be the honest discretion of honest and capable administrators. That was done, not for a private or personal purpose, but for a public purpose which we must assume to have been worthy of being protected by words as clear and unqualified as those we find in s. 49 of this Act.

My Lords, for those reasons I entirely concur in the conclusion announced by my noble and learned friend on the Woolsack.

(1) [1893] 1 Ch. 16.

LORD ROBERTSON. My Lords, I agree in the judgment which has been proposed, and also in all that has been said.

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Interlocutors appealed from affirmed and the appeal dismissed with costs.

Lords' Journals, July 31, 1905.

Agent for appellants: *H. S. M. Grover, for Beveridge, Sutherland & Smith, S.S.C., Leith.*

Agents for respondents: *Pritchard & Sons, for M'Gregor & Purves, S.W., Edinburgh, and John Richardson, Musselburgh.*

[HOUSE OF LORDS.]

ARDAN STEAMSHIP COMPANY, LIMITED . . . . . } APPELLANTS;

AND

ANDREW WEIR & CO. . . . . RESPONDENTS.

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Ship—Charterparty—Damages for Detention—Reasonable Time for loading—Obligation to have Cargo ready—Custom of Port.

By a charterparty dated May 30, 1900, which did not fix the time within which the vessel was to be loaded, the steamship *Ardandearg*, of which the plaintiffs were owners, was chartered by the defendants to proceed to such loading berth as the freighters might name at Newcastle, New South Wales, and after being in loading berth as ordered to load "in the usual and customary manner" a full and complete cargo of Australian coal, "as ordered by the charterers, which they bind themselves to ship (except in case of riot, strikes, &c., or any other accidents or causes beyond the control of the charterers, which may delay her loading)." By the custom of the port of Newcastle a vessel was not allowed to occupy a loading berth until she had received a loading order from a colliery. These orders were issued in turn, and there were no facilities for storing coal at the port. The *Ardandearg* arrived at her destination on July 14, 1900, and was ready to load; but there was no cargo ready for her until August 13, and then not enough. She had twice to be removed from her berth under a regulation of the port that a vessel must not occupy a berth when not loading, and her loading was not completed until August 23. The plaintiffs claimed damages for the detention of the vessel owing to the delay in providing the cargo:—

Held, reversing the decision of the First Division of the Court of

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Session, that the defendants were liable in damages on the ground that it was their primary duty as charterers to furnish the stipulated cargo; and there was nothing to be found in the charterparty or the evidence which qualified this absolute obligation.

APPEAL from a judgment of the First Division of the Court of Session, Scotland, dated January 19, 1904, which reversed the decision dated April 2, 1903, of the Lord Ordinary (Lord Pearson). (1)

(1) (1904) 6 F. 294.

THE LORD ORDINARY said:—The controversy really turns on the true construction of the charterparty in view of the facts as proved. The defenders found two separate arguments on the words of the obligation to "load in the usual and customary manner a full and complete cargo of Australian coals as ordered by charterers." In the first place, they say that those words import that the charterers fulfil their obligation by ordering the cargo as distinguished from providing it—a construction which is quite inadmissible, and appears to be founded on a mere misreading of the clause. Then it is said that the expression "to load in the usual and customary manner" includes the awaiting a regular colliery turn with the colliery from which the vessel is being loaded, and questions to that effect are put to the witnesses, especially to those examined on commission, and receive an affirmative answer. To me it seems that the "colliery turn" affects the time and not the manner of loading, and that all the ships at Newcastle load in the same manner when their turn comes. If so important a qualification as the "colliery turn" is to be imported into a charterparty I think it ought to be expressed, and not introduced under the cover of an ordinary clause which primâ facie and according to its ordinary use applies to something quite different. I say this on the assumption that the "colliery turn" really forms part of the custom of this port, which I think very doubtful. I do not doubt it is part of the custom of the collieries, but the relative custom of the port seems merely to be (as one would expect) that the port authorities will not allow their loading appliances to be occupied by ships which are not in a position to make use of them. Then it is contended that the exception clause applies. I have already pointed out that it is limited to causes which may delay the loading, and that the failure to provide a cargo, though it results in the loading being delayed, does not primâ facie fall within the application of the clause. Moreover, it is not an impediment ejusdem generis with any of those enumerated in the clause.

I hold then—(1) that the delay was caused, not by the exceptional congestion of shipping, but by the failure of the defenders to perform their primary duty of providing a cargo, and that the principle upon which a reasonable time is allowed to the charterers for loading does not apply to such a case; (2) that if it does apply, the time which elapsed after the ship arrived and was tendered to the defenders as ready to load was primâ facie unreasonable, and that it lies on the defenders to shew that it

The Ardan Steamship Company, the appellants, claimed damages for detention of their steamship *Ardandearg* at Newcastle, New South Wales, by Andrew Weir & Co., the charterers and respondents. By charterparty between the agents for the appellants and the respondents dated May 30, 1900, the *Ardandearg* was chartered by the respondents to proceed with all possible despatch "to such loading berth as freighters may name at Newcastle, New South Wales, and after being in loading berth as ordered . . . . to then load in the usual and customary manner a full and complete cargo of Australian coals as ordered by charterers, which they bind themselves to ship (except in the event of riot, commotion by keelmen, strike, or lock-out of shipper's pitmen, or any hands striking work, frost or floods, or any other accidents or causes beyond the control of the charterers which may delay the loading) . . . . and shall therewith proceed to Java . . . . the cargo to be unloaded at the average rate of not less than 400 tons . . . . per working day. . . . Should steamer not arrive at her loading port and be ready to load on or before July 15, charterers to have the option of cancelling this charter." There was no provision as to the time in which the ship was to be loaded. On June 9 the respondents ordered a cargo of coal from the Lambton Colliery, Newcastle. The *Ardandearg* arrived on July 14; two other ships having coaling orders from the same colliery (which is a small one, producing about 350 tons a day) had arrived before her, and, in consequence of the small output of the colliery and there being no facilities to store coal at the port, the loading of these ships was not completed until August 13. On that date the *Ardandearg*, having obtained a colliery order and a berth, began to load; but twice she had to leave her berth, there being no coal ready, and the loading was not completed until August 23, and she sailed on the next day. Thereupon this action was raised by the appellants for damages for the detention of the vessel for

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was reasonable in the circumstances, which they have failed to do; and (3) that there were no clauses in the charterparty which on a sound construction will excuse the defenders for the delay.

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thirty-one days, which detention they alleged was caused by the respondents not timeously providing a cargo. The appellants contended that if the *Ardandearg* had been able to load in ordinary course the loading would have been completed by July 23.

The respondents averred in their statement: "(3.) Under the charterparty the *Ardandearg* was bound to proceed to Newcastle with all possible despatch. This, as the defenders have since learned, she failed to do, having loaded a cargo at Kobe and discharged the same at Sydney. But for this delay the *Ardandearg* would have received a loading berth, and been loaded much sooner than she was. On her arrival at Newcastle there was a large accumulation of tonnage, both steam and sailing, and the *Ardandearg* was thus prevented from getting a berth. This accumulation was caused by disputes between masters and workmen and scarcity of workmen, which restricted the output at the pit from which the *Ardandearg* was to get coal.

"(4.) Two steamers, the *Palatinia* and the *Timor*, which were to load from the Lambton Colliery, arrived a day or two before the *Ardandearg*. The defenders' agent at Sydney warned the captain of the *Ardandearg* that he should proceed to Newcastle so as to catch her turn before said two vessels arrived. Instead, however, of doing so he delayed at Sydney. Owing to the *Ardandearg* arriving at Newcastle after the said two vessels which were loading from the same colliery, she failed to get a loading berth until after they were loaded, waiting her turn in accordance with the ordinary and customary manner of loading at Newcastle. Owing to the cause above specified the *Ardandearg* only got a loading berth on August 13. No delay for which the defenders are responsible under the charterparty occurred."

May 22, 23, 25, 26. *Carver*, *K.C.*, and *Bailhache* (with them *James Clark*, of the Scottish Bar), for the appellants. The plaintiffs' vessel, if the coal had been ready, would have had no difficulty in getting a berth. That the coal was not ready was entirely the fault of the charterers. This particular

colliery had entered into a contract to supply 15,000 tons; and it could produce 350 tons only a day, and one ship only could load at a time. The question was on whom the risk of delay was to fall when the colliery could only supply so small a daily amount and the ship was ready. The liability for delay falls on the charterers; for, in the absence of stipulation to the contrary, it has always been held that the merchant under contract of affreightment is absolutely bound to have his cargo in readiness for the ship at the port of loading, so that she may be loaded within the lay-days, if such are stipulated for, or within a reasonable time if no lay-days are fixed: Earl of Selborne L.C. in *Grant & Co.* v. *Coverdale, Todd & Co.* (1); *Kay* v. *Field & Co.* (2); Lord Blackburn in *Postlethwaite* v. *Freeland* (3); *Gardiner* v. *Macfarlane, M'Crindell & Co.* (4)

The exceptions in the charterparty do not exonerate the charterers from not having a cargo ready. In considering what is a reasonable time for loading, regard no doubt must be had to the circumstances existing in the port at the time the vessel is waiting for her cargo. If, for instance, the customary loading is by cranes, and all cranes are occupied, or if the customary manner of loading is by lighters, and the necessary number of lighters through no fault of the charterers are not to be obtained, the charterers are not liable for delay so caused. But where, as here, the delay is caused by the failure of the charterers to make due and timeous provision to supply a cargo, the responsibility for detention will not be discharged by the charterers attempting to shew that they individually took reasonable means to fulfil their contract, and that the blame rested with the colliery with which the charterers contracted. What in this case have the rules or custom of the colliery as to working to do with the appellants? The custom of the colliery is not a part of the charterparty. The evidence shewed that at the time the charterparty was signed the respondents had made no arrangements for obtaining a cargo. Not until June 9, 1900, did they enter into a contract with the Scottish Australian Mining Company, by which that

(1) (1884) 9 App. Cas. 470, 475.
(2) (1882) 10 Q. B. D. 241.
(3) (1880) 5 App. Cas. 599, 619.
(4) (1893) 20 R. 414.

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company agreed to load the vessel with a cargo of 5000 tons of best Lambton coals at Newcastle. That contract contained the important qualification of the colliery's liability to supply the cargo, namely, that it was to be loaded in colliery turn. The colliery in question, therefore, took no responsibility as to the time within which the vessel was to be loaded. Before this contract was made the respondents were absolutely in the dark and knew nothing of the output of the Lambton Colliery, and made no inquiries. They therefore left it to chance within what time the vessel would be loaded. If the output of the Lambton Colliery had been as large as other Newcastle collieries, and no other vessel had a prior colliery turn to load, the *Ardandearg* might have been loaded in three days. On the other hand, if the output was small and other vessels had a prior colliery turn, the loading might take a month. Here, even if there had been no ships with a colliery turn before the *Ardandearg*, the minimum time for loading 5000 tons from the Lambton Colliery would have been thirteen days—a period much in excess of reasonable time. But it is now known that the colliery company had booked orders to supply three vessels of the same size as the *Ardandearg*. They had no stock of coal at the colliery or at Newcastle; so, assuming the three ships did arrive about the same time, as happened, the last to arrive must wait. How can the respondents be said to implement their contract with the appellants by entering into such a contract? If they chose to take the risks which such a contract entailed, they must answer to the shipowners. It must also be remembered that the respondents were in no way precluded by the charterparty from making suitable arrangements for loading the *Ardendearg* with a cargo of coal of any quality or description so long as it was South Australian; and there was no evidence that at the time the respondents entered into the contract to buy Lambton coal they could not have made arrangements with other collieries; nor is there any evidence that collieries are in custom to overbook themselves as this colliery did. It might be otherwise if the appellants by their charterparty were only entitled to have the vessel loaded in regular turn of any colliery with which the respond-

ents might choose to book. But "as customary" in this charterparty does not include "colliery turn": where a ship is to take the risk of a colliery turn this must be expressly provided for. Further, no attempt was made to shew that in the usage of trade the words "in the usual and customary manner," qualifying as they do the clause as to loading, have anything to do with "colliery turn." Those words refer to the manner of loading, and not to the time within which the loading is to proceed. Nor can it be said by the respondents that the fact that the colliery company chose to agree to supply other vessels was an accident beyond the respondents' control: *In re Richardsons and Samuel & Co.* (1), a much stronger case than the present; see also *Jones* v. *Green.* (2) By the harbour-master's evidence it was proved there was no difficulty in getting a berth if the cargo had been ready. The charterers prevented the ship from getting a berth by not having a cargo ready; it was not any custom of the port which prevented her from getting a berth: *Krog & Co.* v. *Burns & Lindemann* (3); *Hudson* v. *Ede* (4); *Tharsis Sulphur and Copper Co.* v. *Morel Brothers & Co.* (5) There was an option given to the charterers to select the colliery, and they were bound to select one able to supply a cargo for the ship on her getting a berth.

[They also commented on *Jones* v. *Green* (2) (which with two other cases, *The Barque Quilpué* v. *J. & A. Brown* (6), *Ryland & Co.* v. *Anthony Gibb, Sons & Co.*, were decided by Kennedy J. on December 2, 1902) and *Dobell* v. *Green.* (7)]

T. E. Scrutton, K.C., and *Ure, K.C.* (the latter of the Scottish Bar), for the respondents. It was proved that there were a number of small collieries at Newcastle, New South Wales; none of them could supply coal fast enough to load more than one vessel at a time. Coal has to come from all these collieries over a common railway, and the cranes can load in a day more than the output of any one colliery. As each colliery can only load one vessel at a time, vessels berthed

(1) [1898] 1 Q. B. 261.
(2) [1904] 2 K. B. 275.
(3) (1903) 5 F. 1189.
(4) (1867) L. R. 2 Q. B. 566; (1868) L. R. 3 Q. B. 412.
(5) [1891] 2 Q. B. 647.
(6) [1904] 2 K. B. 264.
(7) [1900] 1 Q. B. 526.

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to a particular colliery load in turn of arrival, and always have to wait till vessels in turn before them are loaded. The berthing-master does not give a vessel a loading berth until he gets a loading order from the colliery. The working of this colliery was well known to shipowners and merchants, and, owing to the peculiar working of these collieries, when a shipowner got a fixed turn for loading, thirty colliery days were allowed for a steamer and three months for a sailing vessel. Where a shipowner has not stipulated for loading within a specified number of days the charterers must get a loading berth within a reasonable time, taking into consideration the exigencies and custom of the port: *Hick* v. *Raymond.* (1) In the three cases, *R. & D. Jones* v. *F. Green & Co.* (2), *The Barque Quilpué* v. *J. & A. Brown* (3), and *R. W. Ryland & Co.* v. *Anthony Gibb, Sons & Co.*, loaded from this colliery, the *Quilpué* was kept sixty-three days before she got a berth, and the *Snowdon* (*Jones* v. *Green* (2)) 105 days; and in all these cases the Court of Appeal (affirming Kennedy J.) decided in favour of the charterers. The option is given for the benefit of the charterers. They have the power to name a convenient berth or colliery, not an impossible one; but short of that, if they name a well-known and well-established colliery, the risk of delay falls on the shipowner: *Tapscott* v. *Balfour* (4); *Tharsis Sulphur and Copper Co.* v. *Morel Brothers & Co.* (5); *Bulman & Dickson* v. *Fenwick & Co.* (6); *Watson* v. *H. Borner & Co.* (7); *Harrowing* v. *Dupré.* (8) An option to name a colliery is the same as if the name is written into the charterparty: Lord Blackburn in *Dahl* v. *Nelson, Donkin & Co.* (9) The charterers have done everything reasonable to get a cargo, and, therefore, are not answerable for delay. They supplied the cargo within a reasonable time. The respondents rely on the judgment of the Lord Chancellor (Earl of Halsbury) in *Little* v. *Stevenson & Co.* (10) There was also a clause in the charterparty that the

(1) [1893] A. C. 22.
(2) [1904] 2 K. B. 275.
(3) [1904] 2 K. B. 264.
(4) (1872) L. R. 8 C. P. 46.
(5) [1891] 2 Q. B. 647, 651.
(6) [1894] 1 Q. B. 179.
(7) (1899) 4 Com. Cas. 335; (1900) 5 Com. Cas. 377.
(8) (1902) 7 Com. Cas. 157.
(9) (1881) 6 App. Cas. 38–44.
(10) [1896] A. C. 108, 116. See post, p. 510.

ship was "tight, staunch, and strong": if she had been, she would have arrived four days before she did; but she lost four days through leaking boilers, and sailed about one-third speed, and so lost her turn. There was no complaint that the selection of this colliery was an unreasonable selection for a ship of this size. It was a totally different thing to say that the charterers must see that the colliery shall not make any more contracts until this one is completed. The shipowners take the risk. This case is similar to *Hudson* v. *Ede* (1), where detention by ice was held to include detention of lighters by ice coming down the Danube to coal the ship.

Carver, K.C., in reply.

The House took time for consideration.

EARL OF HALSBURY L.C. My Lords, this is an action upon a charterparty. The vessel *Ardandearg* was chartered "to proceed to such loading berth as the freighters may name at Newcastle, New South Wales, and after being in loading berth as ordered, to load, in the usual and customary manner, a full and complete cargo of Australian coals, as ordered by charterers, which they bind themselves to ship." Then follow certain exceptions which do not become relevant to this case.

Now, the *Ardandearg* arrived at her destination on July 14, 1900, and was then ready to load her cargo. If the respondents had provided cargo at that date the vessel could have been loaded, and for that purpose would have at once obtained a loading berth. There was no cargo ready for her, however, until August 13, and even then not enough. She had twice to be moved from her berth under a very reasonable regulation at the port, that a vessel should not be permitted to occupy a berth when not loading, and as there was no coal for her she had, as I say, twice to be moved, and her loading was only completed by August 23. Under these circumstances the plaintiffs brought an action for the loss and damage they had sustained in respect of the detention of the *Ardandearg*.

Now, it cannot be denied that the merchant is under an

(1) L. R. 2 Q. B. 566; L. R. 3 Q. B. 412.

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absolute obligation to furnish the stipulated cargo, and I do not understand upon what theory the First Division of the Court of Session overruled the judgment of the Lord Ordinary. With great respect to their Lordships, I may say generally that I think there has been some confusion between the supply of a cargo and the obligation to load, and the qualifications thereof.

My Lords, I am very sorry if any observations of mine or of the late Lord Herschell have been supposed to throw any doubt upon so well-recognised a principle of commercial law as that a merchant is under an absolute obligation to supply the cargo. The case which is supposed to have created the doubt is *Little* v. *Stevenson & Co.* (1), and the passage referred to is at p. 116, beginning: "The proposition of law" (that I disputed) was "that a merchant must be always ready with his cargo at all times and in all places, and under all circumstances to take advantage of any such contingency, if it should arise." My Lords, the passage itself should be referred to, and Lord Herschell's, which is at p. 118, three lines from the bottom: "It is alleged that the obligation existed in point of law, that at all ports, under all circumstances, however unreasonable it might be to anticipate such a contingency, however deficient the quay might be in the means necessary for storing, or protecting, or preserving cargo, whatever difficulties there might be, in short, that was an obligation always resting upon the shipper." My Lords, I thought then, and I think still, that, to use Lord Herschell's language, such an obligation on the shipper would be most unreasonable.

But what relevancy had such a case to the case before your Lordships? The controversy turns, as the Lord Ordinary finds, upon the true construction of the charterparty in view of the facts as proved.

I also agree with the Lord Ordinary that delay in the loading is one thing, and the failure to provide a cargo to load is another and a very different thing. He found as a fact that the failure of the defenders to perform their primary duty of providing a cargo was the cause of the delay.

I am not quite certain that I understand the second ground

(1) [1896] A. C. 108.

upon which it is contended that the ship was liable for delay in arriving at her chartered port. It seems to me that under the circumstances detailed by the master it was quite reasonable for him to do what he did. But, of course, however reasonable, if it were a breach of contract the reasonableness of the master's conduct would be no answer. But I fail to discover where is the contract of which it is a breach. She arrived before the cancelling clause, and I am unable to follow the argument which is supposed to establish her responsibility.

My Lords, I think it is quite immaterial to discuss cases in which it is either proved or assumed that there are particular circumstances known to both the parties, and with reference to what they may be supposed to contract, which may affect both the providing and the loading of the cargo. It is enough to say that no such question arises here, and I am of opinion that the judgment of the Lord Ordinary ought to be restored, and the judgment of the First Division reversed.

LORD DAVEY. My Lords, I am of opinion that the decision of the Lord Ordinary in this case was correct; and I am so well satisfied with the reasons for his opinion given by his Lordship that I should be content to simply express my agreement were it not that we are differing from an unanimous judgment of the Inner House.

Lord Pearson has held that the delay complained of was caused, not by the exceptional congestion of shipping, but by the failure of the defenders (the present respondents) to perform their primary duty of providing a cargo, and that there are no clauses in the charterparty which on a sound construction will excuse the respondents for the delay.

My Lords, in the case of *Postlethwaite* v. *Freeland* (1) Lord Blackburn, in advising this House, said: "I am not aware of any case contradicting the doctrine that in the absence of something to qualify it the undertaking of the merchant to furnish a cargo is absolute." It has been argued that this doctrine was departed from and the obligations of the shipper or charterer to have his cargo ready were expressed in a less

(1) 5 App. Cas. 599, 619.

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absolute form in some observations of the Lord Chancellor and Lord Herschell in *Little* v. *Stevenson*. (1) I do not understand that to be so. I think that what was there laid down must be read with regard to the facts of that case, and that all that was meant was that the shipper's or charterer's obligation is only to have his cargo ready when the ship is ready to receive it in ordinary course, and that he is not bound to be prepared for a contingency or fortuitous circumstance not contemplated by either of the parties.

There is nothing to be found in the charterparty in the present case which, in my opinion, should be held to qualify this absolute obligation of the respondents. The exception of riot, &c., "and other causes beyond the control of the charterers which may delay her loading," in my opinion applies only to the process of loading the cargo when ready, and not to delay in providing the cargo. It has frequently been laid down, and may be taken to be established law, that the mere existence of circumstances beyond the control of the shipper, which make it impracticable for him to have his cargo ready, will not relieve him from paying damages for breach of his obligation: *Adams* v. *Royal Mail Steam Packet Co.* (2) and *Ford* v. *Cotesworth*. (3)

In *Gardiner* v. *Macfarlane* (4) the circumstances were very similar to those in the present case. The Lord Ordinary (Lord Low) there says (5): "I am of opinion that difficulty in obtaining a cargo on account of the output at the colliery which the charterers had selected being restricted is a matter with which the shipowners are not concerned, and that the consequences of any delay arising therefrom must fall on the charterers." I think this is a correct statement of the law, and is applicable to the present case. It has, however, been held that where the cargo is to be provided from a particular place, and the charter has been made in view of circumstances by which, as both parties know, the procuring of a cargo from that place may be delayed, the charterer is excused, and in that case the known

(1) [1896] A. C. 108.
(2) (1858) 5 C. B. (N.S.) 492.
(3) (1868) L. R. 4 Q. B. 127, 134.
(4) 20 R. 414.
(5) 20 R. 414, at p. 421, n.

causes of delay may be taken into account in considering whether the cargo was furnished within reasonable time: *Harris* v. *Dreesman*. (1)

I think that the opinion of the Lord President was founded on some such consideration. His Lordship thought there were circumstances in this case known to both parties which prevented the obligation of the charterers possessing the absolute character alleged. The learned judge referred to the evidence on cross-examination of Mr. Clark, a member of the firm who were managing owners of the vessel and effected the charterparty with the respondents for this voyage. Mr. Clark appears to have had some previous experience with regard to sailing ships loading cargoes of coal at Newcastle; but he did not know with what colliery the respondents would make arrangements, and, in fact, he did not know the various collieries at Newcastle, and only knew some of them by name. But even if he must be taken to have known the usual and customary manner or the conditions of loading at the port, that is not the point. The complaint here is, not of delay in loading, but of delay in procuring the cargo. The respondents, it should be added, do not appear themselves to have been aware, when they effected the charter, of any difficulty there might be in procuring the cargo at the colliery they selected.

It is proved by the evidence of the berthing master at Newcastle that he could have given a berth to the *Ardandearg* on July 14, 1900, the day following her arrival in the port, if coal had been ready for her. But it appears that by a very reasonable regulation of the port a vessel is not allowed to occupy a loading berth until she has received a loading order from the colliery. I am not sure that I clearly understand the argument which the respondents found upon this regulation. It seems to be argued that the ship was not ready to be loaded until the cargo was ready for her, and therefore, I suppose, the cargo was provided as soon as she was ready for it, which looks like an argument in a circle. Putting what is in truth the same argument in another way, it is also said that by the regulation "the turn of the colliery" became incorporated in and formed

(1) (1854) 23 L. J. (Ex.) 210.

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part of "the turn of the port," and therefore that the delay took place from the practice of the port, over which the respondents had no control, and which they had no power to displace, for the benefit of this particular ship. This, I think, is the main ground of Lord Kinnear's opinion.

But, however the argument is put, I cannot accede to it. It appears to me that it is only putting the old question in another way. By whose default was it that the ship did not get a loading order? The answer, in my opinion, can only be that it was the default of the respondents in not providing the cargo when the ship was ready to go on the berth to receive it. It is said that the respondents did nothing unreasonable. Be it so. But through their misfortune (it may be) they have failed to perform their contract with the shipowners. In short, the respondents have not satisfied my mind that it was any part of their contract with the appellants that the latter should await the turn of the colliery or take the risk of the cargo not being ready. And I am of opinion that, in accordance with the authorities which were cited in the course of the argument, the respondents are liable to pay damages to the appellants for the detention of the ship.

I am, therefore, of opinion that the interlocutor of the Inner House should be reversed, and the interlocutor of the Lord Ordinary restored with costs here and below.

LORD JAMES. My Lords, I concur in the judgment submitted to the House.

LORD ROBERTSON. My Lords, I concur.

Ordered and adjudged, that the said interlocutor of the First Division of the 19*th day of January*, 1904, *complained of in the appeal, be reversed, and that the interlocutor of the Lord Ordinary* (*Lord Pearson*) *of the* 2*nd day of April*, 1903, *be restored: And it is further ordered, that the said cause be, and the same is hereby, remitted back to the Court of Session in Scotland, to do therein as shall*

be just and consistent with this judgment: And it is further ordered, that the respondents do pay to the appellants the costs of the action in the Court of Session, and also the costs incurred by them in respect of the appeal to this House.

Lords' Journals, August 4, 1905.

Agents for appellants: *Lowless & Co., for J. & J. Ross, W.S., Edinburgh.*

Agents for respondents: *Thomas Cooper & Co., for Campbell Faill, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

STRÖMS BRUKS AKTIE BOLAG . . APPELLANTS;

AND

JOHN & PETER HUTCHISON . . . RESPONDENTS.

Ship—Contract of Carriage—Breach of Contract—Measure of Damages.

The plaintiffs, manufacturers of wood-pulp at Stocka, Sweden, entered into a charterparty dated January 20, 1900, with the defendants, shipowners of Glasgow, by which the latter agreed to carry 900–1000 tons of wood-pulp from Stocka to Cardiff, the cargo to be lifted in two shipments—"One in May (F.O.W.). The second in August–September (owner's option)." The ship was to have liberty to call at any port or ports in order to tow and assist vessels in distress, and to deviate for the purpose of saving life or property; the owners to wire shippers of the cargo, Ströms Bruks, Stocka, six days' notice of readiness; also ship's departure from last port. The contract was made by the plaintiffs with the view of enabling them to fulfil a contract, dated December 4, 1899, for the sale and delivery of 900–1000 tons of wood-pulp to T. Owen & Co., Cardiff. The memorandum of sale contained a column of printed notes, opposite which were written particulars of the special terms of the contract. Against the note "Mode and place of delivery" were the words "C.i.f., Penarth Dock, Cardiff," and against the note "Time of delivery" the words "In two cargoes, first open water, and August–September, 1900." The first cargo, consisting of 500 tons, was duly forwarded and accepted by T. Owen & Co.; but the defendants wholly failed to fulfil their contract with regard to the second shipment, whereby the plaintiffs were unable to complete their contract with T. Owen & Co., who bought in against them 367 tons in several

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parcels in Manchester, Liverpool, and London. The plaintiffs having paid T. Owen & Co. the amount of their claim in respect of the goods so bought in, brought their action to recover from the defendants the amount paid by them :—

Held, reversing the decision of the First Division of the Court of Session, that the appellants were entitled to recover; that the proper measure of damages was the cost of replacing the goods at their place of destination at the time when they ought to have arrived, less the value of the goods in Sweden and the amount of the freight and insurance; and that the plaintiffs' right to damages would not be affected even if it were assumed that the dates of delivery in their contract with the defendants did not exactly coincide with those in their contract with T. Owen & Co.

APPEAL against a decision of the First Division of the Court of Session decided January 26, 1904 (1), by which their Lordships reduced the damages given by the Lord Ordinary on February 27, 1903, to a nominal sum of 50*l.*, and reversed his decision.

The appellants, Ströms Bruks Aktie Bolag, were a Swedish firm of manufacturers of wood-pulp carrying on business at Stocka, Sweden, and the respondents, John & Peter Hutchison, were a Glasgow firm of shipowners. The only question in the appeal was the measure of damages for a breach of contract by the respondents. The facts are given in the opinion of Lord Macnaghten.

May 26, 29. *Hamilton, K.C.*, and *Roberton Christie* (of the Scottish Bar), for the appellants. The decree of the Lord Ordinary was correct. He held that, having regard to the conditions of trade, the existence of a contract of sale to be fulfilled by the shipment of the goods was a thing which in the ordinary course of business the respondents were bound to anticipate, and that, having regard to these known conditions, they were bound to have contemplated that what in fact occurred would be a probable result of their default.

The evidence of the conditions of trade shewed that there was practically no free market for pulp in this country except in a few large towns, and even in these the trade buyers were very limited.

Many users of pulp have their works in places where they

(1) (1904) 6 F. 486.

are the only buyers, and therefore it is of great importance to the Swedish manufacturers, who like to make large forward contracts with paper-makers in this country, that these contracts should be timeously and exactly fulfilled, the pulp being bulky and inconvenient for land carriage. If owing to delay the cargo is refused, the sellers are practically at the mercy of the particular buyers, owing to the difficulty of selling rejected pulp elsewhere. These conditions of the pulp market are well known generally, and particularly in shipping circles. The evidence shewed also that no readiness was proved by the respondents in either August or September with respect to the second shipment; therefore on September 24 the respondents were in breach of their contract, having failed to give six days' notice of readiness to ship in September, and no ship having been sent in September at all. There was thus a breach of contract; and the respondents do not deny that there was a breach. Being anxious T. Owen & Co. early in September began to make inquiries as to the second cargo, and by the 15th they wrote the appellants' agents urging them to pass the matter on to the appellants. The appellants in turn wired the respondents' agent to know when they might expect the steamer. The Cardiff buyers became more pressing, and, when on September 24 it became apparent that the shipment could not be made by the end of September, the buyers intimated that they must buy in against the contract. It was absolutely impossible for the appellants at that late period in the year to engage other tonnage, and the appellants had to acquiesce and ultimately to pay the buyers 830*l.* 18*s.* 5*d.* on about 367 tons bought in against them. There remained to complete the cargo thirty-three tons, which the appellants succeeded in inducing T. Owen & Co. to accept in December, on which the appellants had to pay an enhanced freight of 5*s.* 9*d.* per ton, amounting to 9*l.* 9*s.* 9*d.* By these two sums the appellants were out of pocket 840*l.* 2*s.*, which, after giving credit for 125*l.* (profit realized on 100 tons), left a balance of 715*l.* 8*s.* 2*d.*, being the sum the appellants sued for. This sum represented actual loss to the appellants directly consequential upon the respondents' failure to ship the pulp contracted for. In these circumstances it

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cannot be denied that the above sum was damage occurring naturally from the breach of contract. The respondents were bound to have in view that which in fact happened, as a probable result of their breach. In the First Division Lord M'Laren, who gave the judgment below, concurred in this view, but placed upon the contract of sale a construction the effect of which was that whereas the respondents might have exactly fulfilled the contract by shipping the goods on the last day of September, the contract with T. Owen & Co. required delivery at Cardiff upon that date; so that the loss through T. Owen & Co. having bought in was not in this view necessarily occasioned by the respondents' default. The Court of Session accordingly held that the appellants had not established their right in law to recover the damage they had sustained; but, considering that such a breach as was undoubtedly committed must have involved some damage, they gave the appellants 50*l.* as nominal damages. The appellants submit that the judgment of the First Division was erroneous. The appellants do not claim profits, but only the difference between the price and the cost of replacing the goods.

[They referred to *Lecky & Co.* v. *Ogilvy, Gillanders & Co.* (1); *Delaurier & Co.* v. *Wyllie* (2); *Godard* v. *Gray* (3); *Harrison* v. *Wright* (4); *Dimech* v. *Corlett* (5); *British Columbia Sawmill Co.* v. *Nettleship* (6); *The Parana* (7); *Dunn* v. *Bucknall Brothers* (8); *Dunlop* v. *Higgins* (9); *Watt* v. *Mitchell.* (10)]

Scott Dickson, L.A., and *Bailhache*, for the respondents. There is no difference between the English and Scottish law as to damages. The damages which the appellants claim are damages which they paid in this country to their customers T. Owen & Co., to whom they had contracted to supply pulp manufactured in Sweden. But the cause of the loss was that the appellants had bound themselves to T. Owen & Co. to

(1) (1897) 3 Com. Cas. 29.
(2) (1889) 27 S. L. R. 148.
(3) (1870) L. R. 6 Q. B. 139.
(4) (1811) 13 East, 343; 12 R. R. 369.
(5) (1858) 12 Moo. P. C. 199.
(6) (1868) L. R. 3 C. P. 499.
(7) (1877) 2 P. D. 118.
(8) [1902] 2 K. B. 614.
(9) (1848) 1 H. L. C. 381, 402.
(10) (1839) 1 D. 1157.

deliver pulp in September, and they had not made an equally specific contract with the shipowners. No mention is made in the charterparty of the contract with T. Owen & Co., or in the correspondence previous to the breach. If the cargo had arrived on October 22 the respondents would have been within their contract; for, looking to the terms of the contract giving leave to call at different ports, cargo shipped in Sweden on September 30 would not arrive at Cardiff for at least three weeks after shipment. The breach the respondents committed did not cause the damage arising from T. Owen & Co. buying in: see Kelly C.B., *Horne* v. *Midland Ry. Co.* (1) If the pulp was not in this country by September 30, T. Owen & Co. had to buy in or close their works. But the respondents' contract would have been complied with if the pulp had been placed on board on September 30, and yet the breach at Cardiff would have occurred at the same moment. And it is not proved that if the goods had been allowed to come on that the appellants would have suffered any damage: see *Rodocanachi, Sons & Co.* v. *Milburn Brothers* (2); *Bostock & Co.* v. *Nicholson & Sons.* (3) As to the penalty clause, see *Godard* v. *Gray* (4), *Johnstone's Trustees* v. *Johnstone* (5), Bell's Prin. s. 33, and *Watt* v. *Mitchell.* (6) The parties limited their liability to the estimated amount of the freight on the quantity not shipped. The appellants in their condescendence 4 only say as to damage: "The defenders, in breach of their contract under the said charterparty, failed to send a ship for the remainder of the pulp during August–September. The pursuers thereby sustained damage for which the defenders are responsible." And condescendence 6: "Owing to the advanced period of the season the pursuers found it impossible to minimise their loss by disposing of the pulp left on their hands through defenders' failure to provide shipping at the higher prices which were ruling in England for 'spot' pulp. They did manage to dispose of 100 tons at a higher price; the remainder they

(1) (1873) L. R. 8 C. P. 131.
(2) (1886) 18 Q. B. D. 67, 77, 78, 80.
(3) [1904] 1 K. B. 725.
(4) L. R. 6 Q. B. 139.
(5) (Jan. 18, 1819) 19 Fac. Coll. 624.
(6) 1 D. 1157.

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were unable to dispose of, and (as Stocka is an ice-bound port during winter) they have had to store it. They have therefore incurred charges for storage and insurance as well as running risks of deterioration." They do not go on to say they sold it next year at a lower price. They limited themselves to one particular damage, namely, what they had to pay T. Owen & Co. They do not plead general damage, and, having failed to make that claim, they cannot claim general damage: *Warin & Craven* v. *Forrester* (1); *Delaurier* v. *Wyllie* (2); *Duff & Co.* v. *Iron and Steel Fencing and Buildings Co.* (3); *Ireland & Son* v. *Merryton Coal Co.* (4); *Dunn & Co.* v. *Anderston Foundry Co.* (5); *"Den of Ogil" Co.* v. *Caledonian Ry. Co.* (6) There is no doubt the appellants have proved a breach of contract, but for that they are only entitled to nominal damages. Further, mere notice of the special contract with T. Owen & Co. was not enough: the respondents to be liable must have knowledge sufficient to shew them they ran special risks: *Horne* v. *Midland Ry. Co.* (7); *British Columbia Sawmill Co.* v. *Nettleship.* (8)

Hamilton, K.C., in reply. The respondents must have known this pulp was to be sold in England. They had nine months to get a steamer to take away the pulp. The appellants claim no profit, but simply the cost of obtaining the pulp not carried. As to the point on the pleadings, the amount claimed can be recovered as general damage. The Scottish Courts have always preserved a free hand (as if they were a jury) to give damages for what the pursuers have suffered: *Keddie, Gordon & Co.* v. *North British Ry. Co.* (9)

The House took time for consideration.

LORD MACNAGHTEN. My Lords, the appellants, who were pursuers in the action, are a Swedish firm carrying on business as manufacturers of wood-pulp at Stocka. They claim damages

(1) (1876) 4 R. 190; (1877) 4 R. (H.L.) 75.
(2) (1889) 17 R. 167.
(3) (1891) 19 R. 199.
(4) (1894) 21 R. 989.
(5) (1894) 21 R. 880.
(6) (1902) 5 F. 99.
(7) L. R. 8 C. P. 131.
(8) L. R. 3 C. P. 499.
(9) (1886) 14 R. 233.

from the respondents, shipowners at Glasgow, for breach of a contract of carriage.

The contract was dated January 20, 1900. By it the respondents agreed to carry 900–1000 tons (charterer's option) of wood-pulp to Cardiff. The cargo was to be lifted in two shipments, one in May f.o.w., the second in August–September (owner's option). The ship was to have liberty to call at any port or ports in any order, to tow and assist vessels in distress, and to deviate for the purpose of saving life or property. The owners were to wire shippers of the cargo, Ströms Bruks, Stocka, six days' notice of readiness, also ship's departure from last port.

This contract it seems was made by the appellants with the view of enabling them to fulfil a contract, dated December 4, 1899, for the sale and delivery of 900–1000 tons of wood-pulp to Thomas Owen & Co., Limited, of Cardiff. The memorandum of sale contained a column of printed notes, opposite which were written particulars of the special terms of the contract. Against the note "Mode and place of delivery" were the words "C.I.F., Penarth Dock, Cardiff," and against the note "Time of delivery" the words "in two cargoes, first open water, and August–September, 1900."

The first shipment—a shipment of 500 tons—was made in due course and accepted. The respondents failed to perform their obligations with regard to the second shipment. The breach is not disputed. The only question is what damages, if any, are recoverable under the circumstances of the case.

On September 24, 1900—that is, six days before the end of the month—it became evident that the respondents, who had given no "notice of readiness" or of "ship's departure from last port," were not in a position to fulfil their contract, and consequently that the appellants would not be in a position to fulfil their contract with Thomas Owen & Co. by means of the shipment which the respondents had contracted to deliver.

In these circumstances Thomas Owen & Co., who were entitled to claim 400 tons more, bought in against the appellants in several parcels 367 tons of wood-pulp for consumption

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at their works. There seems to be no market for wood-pulp at Cardiff. They were, therefore, compelled to purchase, as best they could, in Manchester, Liverpool, and London, and to pay in addition the cost of carriage. It is not disputed that Thomas Owen & Co. acted reasonably, and that the pulp required could not have been bought at less cost.

Thomas Owen & Co. made a claim against the appellants for 830*l.* 18*s.* 5*d.* in respect of the 367 tons which they had bought in. The appellants, as they were bound to do, paid them the amount of their claim. Then the appellants claimed over against the respondents. Their claim was for 715*l.* 8*s.* 2*d.* They brought into account the 830*l.* 18*s.* 5*d.* which they had to pay Thomas Owen & Co., and also 9*l.* 9*s.* 9*d.* for extra freight on the balance of 33 tons which Thomas Owen & Co. accepted at a later date, making up the full 400 tons to which they were entitled. On the other hand, the appellants, unnecessarily as it appears, gave credit for 125*l.* as profit on the 100 tons which the respondents were bound to carry, but which the appellants were not bound to deliver. The respondents, however, refused to make compensation for their breach of contract, and then this action was brought.

In the first place, the respondents contended that by the terms of the charterparty damages for breach of contract were limited to the estimated amount of freight on quantity not shipped. Both Courts have rejected this contention, treating the question as settled by authority. On this point I have nothing to add to what was said by the Lord Ordinary and by Lord M'Laren in the Court of Session.

The question as to the measure of damages gave rise to a serious difference of opinion. The Lord Ordinary held the appellants entitled to recover the amount of their claim with costs. In the Court of Session they were only awarded 50*l.* as nominal damages, and ordered to pay substantially the whole costs of the action. The decision proceeded on the ground that in the view of the Court the appellants' contract with the respondents did not happen to coincide exactly with their contract with Thomas Owen & Co. The loss which they sustained was, therefore, it was said, due to their own fault.

The true cause of their inability "to make delivery in terms of their contract was that they had not taken the shipowners bound to deliver the cargo within the time prescribed in their contract with Messrs. Owen & Co." Lord Kinnear, indeed, went so far as to say that "the one loss had nothing to do with the other."

The learned counsel for the appellants in his opening address referred to the case of *Dunlop* v. *Higgins* (1), and contended that, according to the law of Scotland as explained by Lord Cottenham, a party disappointed by a breach of contract was entitled to compensation on a more liberal scale than would be allowed by the law of England. The case of *Dunlop* v. *Higgins* (1) was decided in 1848. Whatever may have been the state of the law at that date, I do not think that the learned counsel succeeded in persuading your Lordships that there is any difference in the law of the two countries at the present time on such a question as that under consideration. The view enunciated by Lord Cottenham is certainly not law in England. Whenever that view has been referred to by counsel as a guide in an English case, it has been unfavourably criticized, and notably by Willes and Crompton JJ. (2) So far as I could gather from the learned counsel who addressed the House in the present case, *Dunlop* v. *Higgins* (1) has rarely, if ever, been cited as an authority in Scotland.

For the decision of the question before your Lordships, it will be enough, I think, to appeal to the rules as to the measure of damages which have been accepted in Scotland as well as in England, asking your Lordships' attention to the position of the litigant parties and the claim which has actually been made.

Your Lordships will observe that this is not a case like many in the books where a carrier is bound to accept the goods, and some unforeseen accident by land or sea has prevented due delivery. It is a case where persons free to contract or not to contract have deliberately made a bargain and deliberately broken it for their own convenience, alleging only by way of

(1) 1 H. L. C. 381.
(2) *Borries* v. *Hutchinson*, (1865) 18 C. B. (N.S.) 452; *Williams* v. *Reynolds*, (1865) 6 B. & S. 502.

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excuse that they did not think the consequences would be so serious, and rather blaming the party they have disappointed for not keeping them up to the mark. True it is, they said, you made pressing inquiries as to the fulfilment of the contract, but that means nothing. You "merely requested us to hurry the boat, which is a very ordinary request." Then your Lordships will observe that, although it is not suggested that the respondents knew the particular terms of the bargain with Thomas Owen & Co., they must have known, as every business man in their position would know, that in all probability the goods were being despatched to England in order to fulfil some contract either actually in existence at the time or in immediate contemplation, so that a breach of their contract with the manufacturers in Sweden might cause a breach of contract with some manufacturer or merchant in England, and lead to a claim of damages by him against the shippers of the goods. The respondents, therefore, were certainly not justified in assuming that in the discharge of their obligations punctuality was a matter of little moment.

Now if the respondents had given timely notice of their inability or unwillingness to perform their contract, the appellants might possibly have secured other means of transport. In that case the measure of damages would probably have been just what was claimed in the case of the thirty-three tons—merely the difference in freight. But at the time when the appellants received notice of the contract having been broken, it would not have been possible for them to get a ship to go to Stocka so as to reach that port by the end of September. "Practically speaking," says Mr. Mackintosh, an independent witness who had considerable experience with shipping business in Baltic ports, "it was quite impossible in those days." So the rule laid down in *Rice* v. *Baxendale* (1) must be applied. That rule is this: "Setting aside all special damage, the natural and fair measure of damages is the value of the goods at the place and time at which they ought to have been delivered to the owner": per Blackburn J., *O'Hanlan* v. *Great Western Ry. Co.* (2) The appellants' claim is made on

(1) (1861) 7 H. & N. 96. (2) (1865) 6 B. & S. 484, 491.

that footing. All they want is to be protected against loss. Their claim is simply for the extra cost of supplying at the stipulated time and at the agreed place of delivery goods as nearly as possible of the same description and quality as those which the respondents had undertaken to deliver. They do not claim profits. They do not even make any claim for the warehousing and insurance of the goods left on their hands, or for diminution in the value of those goods by reason of the subsequent fall in the market. They actually concede to the respondents the profit on the extra 100 tons, to which, as far as I can see, the respondents can have no possible claim.

In the Court of Session the respondents advanced with success a most ingenious argument. They said, "We have now discovered the exact terms of your contract with Thomas Owen & Co. Those terms did not correspond precisely with the terms of your contract with us. We might have fulfilled our contract to the very letter, and still you might have been left in the lurch as regards your contract with Thomas Owen & Co. We might have put off shipping your wood-pulp to the very last day in September, and then we might have gone about picking up cargo at various ports in any order we pleased, and thus without deviating from our voyage, as under certain circumstances we were at liberty to do, it might have been rather late in the year before your wood-pulp would have been delivered at Cardiff. You have claimed special damages; you have not proved the special damage you allege, and you have not pleaded general damage. So, though we have not thought it worth our while to appeal against the liberal award which has been made in your favour under the head of nominal damages, you are really entitled to nothing at all."

It seems to me that this argument is founded on an inaccurate use, or perhaps I should say a less accurate application, of the terms "special damage" and "general damage." That division of damages is more appropriate, I think, in cases of tort than in cases of contract. "General damages," as I understand the term, are such as the law will presume to be the direct natural or probable consequence of the act complained of. "Special damages," on the other hand, are such as the law

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will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character, and, therefore, they must be claimed specially and proved strictly. In cases of contract, special or exceptional damages cannot be claimed unless such damages were within the contemplation of both parties at the time of the contract. Now the appellants are not claiming here exceptional damages. They are claiming nothing but ordinary damages ascertained and limited by the special circumstances of the case. No doubt they are claiming over against the respondents the damages they have had to pay to Thomas Owen & Co. But if there had been no contract at all between the appellants and Thomas Owen & Co., and Thomas Owen & Co. had made a similar contract with some third person who failed to perform his bargain, and Thomas Owen & Co. had bought in against that third person just as they did against the appellants, their purchases would have been the best evidence possible of the measure of damages resulting from the respondents' breach of contract.

I am unable to see what difference it can make whether you claim damages generally and shew that an award of general damages would include and cover a special loss from which you seek relief, or whether you seek compensation for a special loss and shew that the loss would be more than covered or compensated by an award of general damages.

I do not think there is any substance in the respondents' argument.

My Lords, I prefer to rest my judgment on this broad ground. But I am not satisfied that the appellants have not claimed damages in general terms, if it be necessary for them to do so. The first plea in law seems to be a claim to general damages, and certainly no authority was cited to shew that in such a case as this the Court would refuse to assist the pursuer. Nor am I satisfied that the contract with Thomas Owen & Co. does not correspond exactly with the contract of carriage. There was evidence to the effect that according to mercantile usage the contract with Thomas Owen & Co. being a c.i.f. contract would be satisfied by the delivery of the goods on board ship

at Stocka at any time in September. The delivery of the second shipment would thus correspond with the delivery of the first shipment, which was to be "first open water." Certainly, Thomas Owen & Co. seem to have taken that view at first, for on September 5, 1900, they write from Cardiff: "As you are aware the balance of the Ströms sulphite is to be shipped in August–September, and we shall therefore be glad if you will kindly tell us when we may expect the steamer to arrive here." Moreover, their manager in his examination admitted that they would have been satisfied with the shipment if it had been despatched from Stocka before the end of September. I doubt, however, whether the Court could decide that question in this action, and at any rate I do not think that the Court ought to be astute in defeating an honest claim in favour of persons who have wilfully disregarded their obligations.

I think that the appeal should be allowed, and the judgment of the Lord Ordinary restored with costs here and below, and I move your Lordships accordingly.

LORD DAVEY. My Lords, the only question on this appeal is the amount of damages payable by the respondents for an admitted breach of contract. The conclusion which I have formed from a consideration of the cases cited at the bar is that in recent years, at any rate, the English decisions as to the measure of damages have been followed by the Scottish Courts, but with some elasticity in the application of them; and, if I may respectfully say so, I think it is of great importance that in commercial cases there should be uniformity in the administration of the law.

My Lords, the learned judges in the Inner House agree with the Lord Ordinary in thinking that the respondents, when they entered into the contract of affreightment with the appellants, must be presumed to have contemplated that the appellants were shipping the goods in performance of a contract limited as to time of delivery. And having regard to the evidence as to the character of this pulp business, I see no reason to differ from this conclusion. But the learned

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judges differ widely from the Lord Ordinary in holding that the loss for which damages are claimed in the pleadings was not consequent on the respondents' failure to fulfil their contract. If, however, the Lord Ordinary has put the right construction on the contract of the appellants with their purchasers in Cardiff it is not disputed that he is right in his conclusion. The difficulty arises from a cause of which your Lordships have had frequent experience in commercial contracts, namely, the use of a printed form which is not exactly adapted to the particular case without making the necessary alterations. The material words of the contract are—"Mode and place of delivery" (in print), "C.I.F., Penarth Dock, Cardiff" (in writing). "Time of delivery" (in print), "In two cargoes first open water and August–September, 1900" (in writing). Lord M'Laren says that he is unable to see how these words as regards the second delivery can mean anything but delivery at Cardiff before the end of September. But it is admitted that the words "first open water" mean by a shipment then made," i.e., when the port of shipment is first free from ice, and it is equally easy to say with the Lord Ordinary that the words "August–September" must refer also to a shipment made in either of those months, or (in other words) that the time of delivery is defined by the date of shipment and not by the date of arrival. On the whole, I prefer the construction put upon the words by the Lord Ordinary, and I think that construction is aided by the fact of the contract being "c.i.f." with its recognised legal incidents, one of which is that the shipper fulfils his obligation when he has put the cargo on board and forwarded to the purchaser a bill of lading and policy of insurance with a credit note for the freight, as explained by Lord Blackburn in *Ireland* v. *Livingston*. (1) But I think that Mr. Hamilton perhaps put his argument too high in treating this consideration as conclusive.

But, my Lords, I agree with my noble and learned friend Lord Macnaghten that on any view of the contract the interlocutor of the Lord Ordinary should have been sustained. The learned judges have not laid down any particular measure of

(1) (1871) L. R. 5 H. L. 395, 406.

damages, for in the view which they have taken that the failure of the appellants to fulfil their contract with Messrs. Owen was not the consequence of the default of the respondents, as alleged in the condescendence, Lord M'Laren held there was no evidence of any other damages, and gave 50*l.* as an estimated sum for any inconvenience the appellants have been put to, and this was acquiesced in by Lord Kinnear with some misgivings. I cannot agree that there is no evidence upon which the Court could act. I am of opinion that the proper measure of damages would have been the cost of replacing the goods at their place of destination at the time when they ought to have arrived, less the value of the goods in Sweden and the amount of the freight and insurance. There was evidence that it was practically impossible to obtain another vessel to take the goods from Stocka at that time of year, and I think, therefore, that the appellants were justified in buying or (which is the same thing for this purpose) allowing their purchasers to buy in as soon as it was apparent (as it was before the end of September) that the respondents could not perform their contract. And I think that the actual purchases made might properly be taken as evidence of the cost of replacing the goods in Cardiff in the middle of the month of October. On the other hand, the appellants had no other buyers ready to take their 400 tons of pulp, and there was evidence that it would have been a speculative and very risky thing to send that quantity to Cardiff or elsewhere for sale without having secured a purchaser, and that prices subsequently fell. I think, therefore, there was evidence upon which the Court might, without any injustice to the respondents, have found the value of the goods in Sweden with freight and insurance would not exceed the price in Messrs. Owens' contract. I am not, therefore, disposed to disagree with the alternative view taken by the Lord Ordinary if his construction of the appellants' contract with the purchasers be not adopted. I should add that I am less impressed by the pleading difficulty than I might have been had I not found that neither the Lord Ordinary nor the Inner House considered themselves precluded from giving the pursuers damages other

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than those arising directly out of the contract with Messrs. Owen.

On these grounds I am of opinion that the interlocutor of the Inner House should be reversed, and that of the Lord Ordinary restored with costs here and below.

LORD JAMES. My Lords, I agree with the judgment submitted to the House by my noble and learned friend Lord Macnaghten.

LORD ROBERTSON. My Lords, I concur.

Ordered, that the interlocutor appealed from be reversed, and that the interlocutor of the Lord Ordinary be restored, and that the respondents do pay to the appellants the costs both here and below.

Lords' Journals, August 4, 1905.

Agents for appellants: *Rollit & Sons & Burroughs, for James F. Mackay, W.S., Edinburgh.*

Agents for respondents: *Holman, Birdwood & Co., for J. & J. Ross, W.S., Edinburgh.*

[HOUSE OF LORDS.]

LORD ADVOCATE . . . . . APPELLANT;

AND

ANNA, COUNTESS OF MORAY, AND ANOTHER . . . . . RESPONDENTS.

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Revenue—Estate Duty—Entail—Property—Estate Duty paid by a deceased Heir of Entail and not specifically charged on Entailed Estates—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*a*); *s.* 9, *sub-ss.* 2, 3, 5, *and* 6; *s.* 22, *sub-s.* 2 (*a*), (*c*).

By the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2, sub-s. 1, "property passing on the death of the deceased shall be deemed to include—(*a*) property of which the deceased was at the time of his death competent to dispose." By s. 9, sub-s. 1, "The estate duty on an estate . . . . shall be a first charge on the property in respect of which duty is leviable." By sub-s. 2, "On an application . . . . the Commissioners shall grant a certificate of the estate duty paid in respect of the property." By sub-s. 3, "The certificate of the Commissioners shall be conclusive evidence that the amount of duty named therein is a first charge on the lands." By sub-s. 5, "A person required to pay the estate duty in respect of any property shall . . . . have power to raise the amount of such duty . . . . by the sale or mortgage of, or a terminable charge on, that property." By sub-s. 6, "A person having a limited interest in any property who pays the estate duty in respect of that property shall be entitled to the like charge as if the estate duty in respect of that property had been raised by means of a mortgage to him." By s. 22, sub-s. 2 (*c*), "Money which a person has a general power to charge on property shall be deemed to be property of which he has power to dispose."

An heir of entail who had paid out of his own money estate duty due in respect of the entailed estate on the death of his predecessor died without having taken any steps to charge the sum so paid on the entailed estate. The Crown having claimed an account and estate duty on the sum so paid from his executors:—

Held, reversing the decision of the First Division of the Court of Session (Lord Robertson dissenting), that the money became automatically a statutory charge on the estate, and was placed by the statute in the same position as if the heir of entail paying the duty actually held a bond over the estate for the amount; and that accordingly the deceased heir of entail at the time of his death had a vested transmissible interest in

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the amount of the estate duty he had paid, and was competent to dispose of it:

Held, also, that the Finance Act of 1894 was not to be construed according to the technicalities of the law of England or Scotland, but according to the ordinary popular signification of the words employed.

APPEAL from the judgment of the First Division of the Court of Session, Scotland, sitting as a Court of Exchange. (1)

The appellant was the Lord Advocate, who claimed, at the instance of the Inland Revenue, firstly, an account; and, secondly, estate duty and legacy duty on a sum of 37,740*l.* from the late Earl of Moray's trustees, the respondents. The deceased, Edmund Archibald Stuart, Earl of Moray, who was institute or heir of entail of the Moray entailed estates, died on July 11, 1901. He had succeeded to the Earldom of Moray and the entailed estates in 1895. As heir of entail in possession he was, in the terms of s. 8, sub-s. 4, of the Finance Act, 1894, accountable for the estate duty on the property, and, as he was not entitled to disentail without consents, both estate duty and settlement estate duty then became payable on the value of the estate under s. 23, sub-s. 16, of the Act. He preferred to pay these duties in sixteen half-yearly instalments, and he had at his death paid out of his own funds eleven out of the sixteen instalments due. These payments amounted to 37,740*l.* By his trust disposition and settlement the Earl assigned on trust for certain purposes to his trustees, the respondents, the whole estates heritable and movable which should belong to him or of which he should have the power of disposal at his death, excepting the said entailed estate and some lands held along with them. He directed his trustees, whom he also appointed his executors, in the event of any of the above-mentioned instalments being due at his death, to pay the same, and to apply to the Court for an order on the succeeding heir of entail to grant bonds in their favour for the amount so paid by them. But he gave no similar directions with regard to the instalments he himself had already paid. The Crown, founding on s. 9, sub-s. 6, and sub-s. 5 (2), s. 2, sub-s. 1 (*a*), and s. 22, sub-s. 2 (*a*) and (*c*), claimed estate duty

(1) (1904) 6 F. 347. (2) See post, p. 541.

on the sum of 37,740*l.* The respondents had not in fact received the sum of 37,740*l.*, and they alleged that the Finance Act did not provide any means whereby this sum could be recovered from the entailed estate or heir in possession; and they refused to give an account of the instalments paid, or pay the duties claimed.

The First Division (1), affirming the decision of the Lord Ordinary (Lord Stormonth-Darling), held on February 2, 1904 that the duties were not payable by the respondents.

April 10, 11. *Sir R. B. Finlay, A.-G.*, and *Scott Dickson, L.A.* (with them *A. J. Young*, of the Scottish Bar), for the appellant. The argument of the respondents is that the late Earl conveyed to the heir of entail a release of the right to a charge in respect of the instalments paid; but this cannot be the effect of what has occurred. What he did really amounted to a bequest to the trustees. It cannot be disputed that the interest Earl Edmund had in the entailed estates was a "limited interest": s. 23, sub-ss. 14, 15 (amended by Act of 1896), 16. He could not dispose of the estate without the consent of the next heirs of entail. Under s. 9, sub-s. 6, he was entitled in respect of the instalments of estate duty paid by him "to the like charge as if the estate duty in respect of that property had been raised by means of a mortgage to him"—that is, he was entitled as if the charge was made out in the form of a mortgage. The sub-section creates automatically a charge. Earl Edmund became entitled to that charge, and might have released the entail from that charge; and if this had been done twelve months before his death no estate duty would have been due; but he did not convey it away inter vivos. Part of the estate of the late Earl was the right to this charge, and that must pass under the will to the trustees, unless there is something in the will leaving it to some one else; but there is nothing to shew that it was a legacy to the next heir of entail. But even if it was, the trustees would still be liable for estate duty. The late Earl was competent to dispose of the money because he had a general power of

(1) 6 F. 347.

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disposal, and a general power to charge on the entailed estate: s. 22, sub-s. 2 (*a*), (*c*). The charge being personal property—s. 22, sub-s. 2 (*c*)—estate duty is liable to be paid by the executors: *Laurie's Case* (1); *Harris' Trustees* v. *Harris*. (2) The entailed estate was subject to a charge, and, although not actually made a charge by deed, the heir of entail was benefited to that extent: *Maxwell's Case* (3); see also *Earl Howe's Settled Estates, In re Earl Howe* v. *Kingscote* (4), where Cozens-Hardy L.J. said: "What are the rights of a tenant for life who pays estate duty? They are defined by s. 9, sub-s. 6. He is to have a charge of the same nature and to the same extent as if a mortgage of the estate had been given by the executors under sub-s. 5." An heir of entail is a limited owner. The Scottish statute of 1685, c. 22, shewed the limits placed on an heir of entail; he could not sell nor mortgage, nor change the succession: see Rankine on Landowners, and M'Larin on Succession, vol. i. p. 540. Therefore, we cannot speak of an heir of entail as an unlimited owner: he is subject to serious restrictions. If the heir of entail is a limited owner, s. 9, sub-s. 6, defines exactly what he is to have. He has without anything more being done, on payment of the duty, a charge on the estates as if the estate duty had been raised by a mortgage.

James Avon Clyde, K.C., and *J. R. N. Macphail* (both of the Scottish Bar), (with them the *Hon. E. Feilding*), for the respondents. There are two views in this case—the one, that there resulted to Earl Edmund from payment of the money a bond and disposition in security—that is, that he had a statutory charge on the entailed estates for the amount paid by him, and was placed by statute in the same position as if he actually held a bond over the estates for the amount; the other view is that the effect of the payment was only to give him a power to do something—that is, a res meræ facultatis. The first view cannot be maintained. Such an interpretation of s. 9, sub-s. 6, is utterly inconsistent with the law of Scotland. The appellant's contention involves the proposition that the

(1) (1898) 25 R. 636.
(2) (1904) 6 F. 470.
(3) (1877) 4 R. 1112.
(4) [1903] 2 Ch. 69, 81.

whole system of Scottish land rights has been upset and superseded by a sub-section of an Imperial Finance Act. In the words of the Lord Ordinary, the idea of an actual and operative charge being automatically created without grantor or grantee and without appearing on the records is so entirely foreign to the principles of Scottish conveyancing that Parliament cannot be supposed by the vague words of s. 9, sub-s. 6, to have contemplated such a result. The second view is more naturally the meaning of the Legislature, namely, that the statute puts Earl Edmund in the position of having obtained a bond. But by s. 23, sub-s. 17, he has no bond if he disentails until the claim for it is made. The word "charge" falls far short of an automatic mortgage. It means merely a power to get it; and why should a more potential meaning be given to the word "charge" in s. 9, sub-s. 6, than in sub-s. 5? The word "entitled" is material. "Shall be entitled to the like charge" —s. 9, sub-s. 6—meant that the charge must be completed by the ordinary methods. Earl Edmund could really obtain no security without a writing and the appropriate proceedings to create a charge; but he in fact did nothing but pay the money. Earl Edmund was practically in the same position as an heir of entail who has made improvements of the character contemplated by the entail statutes, and who is empowered to go to the Court for authority to charge a certain proportion of these on the estate. Until he takes these steps he is not a creditor of the estate: *Maxwell's Case.* (1) Until the passing of the Entail Act of 1875 (38 & 39 Vict. c. 61) this right was personal to the heir of entail, and if not exercised it lapsed with his death. By s. 11 of that Act the heir of entail was authorized to bequeath his right expressly. This shews that the right conferred by improvement expenditure is not carried to the executors by general words of conveyance, and that it lapses if not expressly bequeathed by will. Estate and settlement duties were exactly in the position of improvement expenditure prior to 1875, and there is no provision in the Finance Act, 1894, authorizing Earl Edmund to bequeath to the respondents the right to charge these duties; and had he

(1) 4 R. 1112.

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attempted to bequeath them, there is no machinery provided by the Act whereby such a bequest could be made effective. The result is that the heir of entail has a personal right which does not pass to his representatives. If he had wished on the last day of his life to charge these instalments on the entailed estates, or to give to the respondents or any one else a right to such charge, it would have been impossible for him to do so. There were here eleven different payments—that is, in the appellant's view, eleven different bonds. If these were automatic charges, how were they to be discharged? Was it by writing a letter from himself and getting a bond from himself to himself?

Earl Edmund's will shewed that he did not intend that they should be a charge on the estate: *In re Mexborough, Savile* v. *Mexborough.* (1)

It cannot be admitted that an heir of entail has only a limited interest in the entailed estates. He is a fiar, and is so treated by s. 23, sub-s. 15. The statute which defines an heir of entail certainly does not allege that he is a person of limited interest. On the question of the valuation of the right, if the respondents tried to sell this right in the market it would be in vain to try and get a value put on it. If the trustees applied to the new heir of entail for a bond, his answer would be, "I am under no obligation to give you a bond." The respondents are entitled to a proof to prove a discharge of the payment to Earl Edmund; and although there is nothing in writing to prove a discharge, yet if the Act made this a bond and disposition in security without writing, then surely it can be proved without writing that it has been discharged. The judgment of the Court of Session ought not to be disturbed.

Scott Dickson, L.A., in reply. As to the amount of duty now payable, that is a matter of adjustment. [He also referred to *Fairlie's Trustees* v. *Fairlie.* (2)]

The House took time for consideration.

EARL OF HALSBURY L.C. My Lords, this case turns upon the 6th sub-section of s. 9 of the Finance Act, 1894. As I

(1) (1902) 86 L. T. 331. (2) (1860) 22 D. 632, 642.

understand it, the question is whether a sum of 37,740*l.*, which had been paid by the late Earl of Moray in respect of estate duty, formed a transmissible interest, so that the Crown could claim duty upon it.

My Lords, two questions of a very different character appear to me to arise: one is whether the heir of entail, as the Earl was, is a limited owner within the meaning of the 6th sub-section. I do not think it necessary to discuss that question at length, inasmuch as I understand that that point has been decided in Scotland, and I see no reason to question the propriety of the decision.

The other question appears to arise in respect of the appropriateness of the mode and manner by which the statute is to be effective in Scotland. Now to my mind the objection is of a character that would apparently displace the authority of the Legislature in respect of the technology of one part of the United Kingdom. I quite admit that for a time I certainly was very much impressed by Mr. Clyde's argument that, apparently by common consent among those who are familiar with Scottish forms of conveyancing, the language of the statute is absolutely inappropriate. I think one learned judge even goes so far as to say that it is unmeaning. I cannot quite concur in that, because, although it may be very inappropriate language, I do not think any one can really doubt what the meaning of the statute is; and if, although inappropriate language is used, it is known what the meaning of the Legislature is, that meaning must be obeyed in whatever form it may be necessary to adapt the practice of conveyancers to the particular thing that is to be done.

Now the question here is whether this is a charge or can be made a charge upon the estate in respect of which the late Earl did pay 37,740*l.* I observe that those familiar with the subject are able to point out modes by which the thing can be effected although the language by which it is directed is absolutely inappropriate to Scottish conveyancing. To my mind the whole question has been expounded with great precision and accuracy by my noble and learned friend Lord Dunedin, whose judgment I am about to read. It is quite clear that

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whether you call it a charge, or by whatever word you choose to signify it, the thing meant is obvious enough, and the justice of it, if there be justice in it, is manifest enough. A limited owner having to pay for something which is not entirely his own, the Legislature has thought it right that there should be a charge upon the estate in respect of which he has paid it for such and such an amount. That is an intelligible proposition, although I notice that my noble and learned friend Lord Robertson points out what would be the injustice of the arrangement. If it could be said that one person is paying upon the property of another person, I cannot help thinking that the injustice, if there be injustice, is inherent in the nature of the statute, and does not arise from the construction which is to be placed upon it. One mode of illustrating and manifesting that, I think, is this—that if the question arose in England no lawyer would entertain any doubt that it could be properly effected; and is any difference to be made because it is in another part of the United Kingdom to which the Act equally applies, and because the language of conveyancers in that part of the Kingdom must be admitted to be absolutely inappropriate to the thing that is to be done? As regards the substance of the matter, when one looks through the mere technology and sees what is intended to be done, the thing is obvious enough.

Under these circumstances it appears to me that the enactment of the Legislature must be obeyed, and that the judgment of the Court below ought, therefore, to be reversed.

LORD MACNAGHTEN. My Lords, I am not at all insensible to the grave difficulties which have been pointed out so forcibly by the learned judges in Scotland. But I cannot think that those difficulties are insuperable. It must be borne in mind that the Act which your Lordships are now called upon to construe in its application to Scotland applies equally to the whole of the United Kingdom. It is a taxing Act. It must be presumed to have been the intention of Parliament to make the incidence of the taxation the same in Scotland as in England and Ireland, and to extend the same measure of

relief, such as it is, to limited owners called upon to discharge a burthen on the inheritance wherever the property burthened may be situated.

Your Lordships may remember that much the same sort of question arose in *Lord Saltoun's Case* (1), which was referred to in this House not long ago in *Special Commissioners for Income Tax* v. *Pemsel.* (2) In *Lord Saltoun's Case* (1) the Succession Duty Act, 1853, came under consideration, and it was held by this House, reversing the judgment of the Court of Session, that an extrinsic technicality—a technical rule of Scotch feudal conveyancing—must be disregarded when its effect would be to produce inequality. I may, perhaps, be permitted to remind your Lordships of a passage in the judgment of Lord Cranworth in that case, in which his Lordship, speaking of the decision then about to be pronounced, used these words: "This decision, though it would do violence to some of the best-established doctrines of Scotch law if the present question were one of conveyancing, may yet be well admitted in the construction of an Act intended to impose corresponding duties on succession happening under two different systems of law."

With these remarks I would ask your Lordships' attention to the language of the enactment which your Lordships have to apply to the case under consideration. The Finance Act, 1894, s. 9, sub-s. 6, declares that "a person having a limited interest in any property who pays the estate duty in respect of that property shall be entitled to the like charge as if the estate duty in respect of that property had been raised by means of a mortgage to him." He has, therefore, a statutory charge upon the property of the same effect and validity as if the charge had been created by a mortgage duly executed by a person or persons capable of creating such a charge. As applied to England and English land, the enactment is too clear for argument. The charge arises automatically. A person who is declared by statute to be entitled to a charge on doing a certain act gets the charge on doing the act by virtue

(1) (1860) 3 Macq. 659. (2) [1891] A. C. 531.

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of the statute. Nothing more is required to be said or done to perfect his security.

Now one has to apply this provision to land in Scotland, in respect of which the owner, being a limited owner, has paid the duty. The Courts in Scotland hold, and as it seems to me rightly hold, that an heir of entail in the position of the late Lord Moray is a limited owner. If the land in respect of which the duty was paid had been in England or Ireland, he would undoubtedly have had a charge for the amount paid. Why should he be at a disadvantage because the land in respect of which the duty is paid is situated in Scotland? The notion of charging Scottish property in this way may perhaps (to use Lord Wensleydale's language) "do violence to some of the best-established doctrines of Scotch law." But still Parliament is omnipotent. The Courts in Scotland must give effect to the statute. I have no doubt that those Courts, on a proper application, could find some means of perfecting the security by a declaration duly recorded, or perhaps in some more appropriate way.

I need say nothing further upon this point, because I have had the advantage of reading the judgment of my noble and learned friend Lord Dunedin, and, if I may say so with all respect, I agree in it entirely.

I think the Crown is entitled to judgment, and the appeal ought to be allowed.

LORD DAVEY. My Lords, I hope that I have fully appreciated the views taken of this case by the learned judges in the Court of Session, and so powerfully put before us by Mr. Clyde in his argument for the respondents. The reasons given by the learned judges for their judgment undoubtedly oblige your Lordships to consider this case with some anxiety. I find myself, however, unable to agree in the conclusion arrived at and expressed in the interlocutors under appeal.

The question in this appeal is whether the late Lord Moray at the time of his death had a vested transmissible interest in the sum of 37,740*l.* paid by him for instalments of the estate duty which had become payable by him to the Crown on the

family settled estate to which he had succeeded as heir of entail in 1895. And the answer to the question depends primarily on the right construction of s. 9, sub-s. 6, of the Finance Act, 1894. By sub-s. 1 of that section the estate duty is made a first charge on the property in respect of which the duty is leviable. By sub-s. 5 a person required to pay the estate duty is empowered to raise the amount of such duty and any interest and expenses by sale or mortgage of the property, or any part thereof. Sub-s. 6 is in the following words: "A person having a limited interest in any property who pays the estate duty in respect of that property shall be entitled to a like charge as if the estate duty in respect of that property had been raised by means of a mortgage to him."

It has been argued that an heir of entail, though under a strict entail, is not a person having a limited interest in the entailed estate. The contrary has been decided in the case of *Laurie*. (1) It is true he is in law a fiar, subject, however, to the fetters on his power of disposition. It is true also that means have been provided by the Legislature by which he can free himself from the fetters under certain onerous conditions, but so long as they remain he has, in my opinion, only a limited interest within the meaning of the Act.

On the construction of the 6th section two general observations may be made. First, the section applies to England and Scotland alike, and should, I presume, receive the same construction on both sides of the Tweed. And I think that the same principle applies as was laid down in this House with regard to the Succession Duty Act—*Lord Braybrooke* v. *Attorney-General* (2)—that the Act is not to be construed according to the technicalities of the law of England or Scotland, but according to the popular use of the language employed. Secondly, it should be pointed out that the words "charge" (in this connection) and "mortgage" are not technical words in England any more than in Scotland. As regards this subject-matter, a charge in popular language is a burden on land, or the right to have a sum of money with which

(1) (1898) 25 R. 636. (2) (1860) 9 H. L. C. 150.

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the estate is burdened raised out of it. A mortgage is but a security for money lent.

As to the meaning of the words in sub-s. 6, apart from any technical difficulties of application, I should have thought there could not be any difference of opinion. They appear to me to mean that the limited owner who has paid the duty is put in the same position as if he had lent the money for the purpose on the security of a mortgage of the estate to himself. And I think the sub-section gives him all the rights of the holder of a valid and effectual security on the property. To construe the words as meaning only that he may give himself such a charge seems to me at variance with the plain meaning of the language used, and to give no effect to the words at the end of the section which the Legislature has used for the purpose of defining the nature of the charge to which the limited owner has become entitled on payment.

It humbly appears to me irrelevant to discuss whether such a charge or burden could be created by one individual in favour of another without prescribed formalities. This charge is created by the Legislature, and similar charges have been created by other taxing Acts. It does not appear to me a sufficient answer to say that the charge in the Succession Duty Act is in favour of the Crown. It makes no difference in the discussion of the means of effectuating the charge whether the holder of the charge is the Crown or a subject. What the rights of the holder of a valid security are it is not necessary for me to say.

Nor are your Lordships required in the present case to say by what means the intention of the Legislature may be effected. It would be for the Court of Session to determine whether it would give effect to the statutory charge by adjudication, or by the appointment of a judicial factor to receive the rents and profits, or by directing the sale of the property and ordaining the persons in whom it is vested to convey, or in some other way. But I have no doubt of the competence as well as the duty of the Court of Session when the question arises to give effect to what I am constrained to hold is the plain meaning of the statute. And I am fortified in so thinking by the judg-

ment of my noble and learned friend Lord Dunedin, which I have had the opportunity of perusing.

I am therefore of opinion that the late Earl had at the time of his death a transmissible title to a sum of 37,740*l.* to be raised out of the entailed estate. It is said that by the dispositions of his will he released his right in that sum to his successors in the estate. I express no opinion whether he did so or not. But, assuming that he did, it makes no difference to the right of the Crown to duty whether the sum in question passed to one person or another.

I am therefore of opinion that the appeal of the Crown should be allowed.

LORD JAMES. My Lords, I concur with the three judgments which have been submitted to your Lordships.

LORD ROBERTSON. My Lords, I agree with the judgment of the Court of Session. I had prepared a reasoned opinion, but your Lordships have decided the case, and I should be only occupying time unnecessarily if I read it.

LORD DUNEDIN (read by the Earl of Halsbury L.C.). My Lords, the facts in this case are simple and undisputed. The late Edmund, Earl of Moray, succeeded as institute of entail in possession to large landed estates in Scotland in the year 1895. Under the provisions of the Finance Act, 1894, he was liable to pay estate and settlement estate duty in respect of the estates. He chose to avail himself of the option given by s. 6, sub-s. 8, of that Act to pay by means of sixteen half-yearly instalments. He died in June, 1901, having at that time paid eleven of the said instalments, amounting to 37,740*l.*, out of his own funds. This action is now raised by the Crown against the defenders, who are the trustees and executors of the said Edmund, Earl of Moray, under a trust disposition and settlement conveying his property to them, and asks for estate duty and legacy duty on the said sum of 37,740*l.* The learned judges of the First Division of the Court of Session have assoilzied the defenders in respect that in their view the late Earl took no steps during his life to make the 37,740*l.* a charge on the

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landed estate in favour of himself and his executors, and that, he not having done so, no right to do so passed to his executors.

I am not able to agree with their view, which seems to me not to give proper effect to the provisions of the Finance Act, and is further, I think, not consistent with the judgment of the same Division in the case of *Laurie* (1) to which I shall presently advert.

The question, I think, is solved by the 9th section of the Act. Before I examine the terms of the section, it may be well to make some general observations on the principle of construction which a Scottish Court is obliged and bound to apply to such a statute. The Finance Act of 1894 is an Imperial statute applying to England and Scotland alike. It is useless not to recognise the fact that such statutes are usually framed by draftsmen but little conversant with the forms and requirements of conveyancing in Scotland, and that the phraseology which they employ is apt to be directed by the law of England, with which they are familiar.

In such circumstances the Scottish Court must do its best to give effect to the meaning of the statute, not by treating English law terms as unmeaning symbols, but as terms which, although not terms of art in Scotland, may be taken as words of ordinary popular signification, and as such are capable of application to the Scottish system.

It is true that the defect of expression is sought in some cases—and this is one of them—to be remedied by the provisions of an application clause. But an application clause is an aid to interpretation, not a code, and accordingly if it is defective the Court is not thereby absolved from the duty otherwise cast upon it. I have thought this observation necessary, especially in view of what the Lord Ordinary has here said in his judgment about upsetting the fundamental rules of conveyancing. If the meaning of the statute is clear, then the Court must try and square the rules of conveyancing with that meaning as best it can, and nothing short of sheer impossibility will warrant it coming to the conclusion that a provision

(1) 25 R. 636.

which professes to be Imperial is denied in Scotland the effect which it has in England. I am far, however, from suggesting that these principles have been hitherto ignored by the Court of Session. On the contrary, they have applied them, as I shall presently shew, to this very section in the case of *Laurie*. (1) And, further, they have consistently done so in all cases other than those of entail which involve settlement duty. There is no definition of settled property in the application clause (s. 23). And if we turn to the general definition clause (s. 22), we find in (*h*) and (*i*) a definition which as a term of art is utterly meaningless to a Scottish conveyancer, but which the Court has had no difficulty in applying as popular phraseology to the form of Scottish conveyancing.

I proceed to examine the provisions of s. 9. The 6th subsection of that section is in these terms: "A person having a limited interest in any property who pays the estate duty in respect of that property shall be entitled to the like charge as if the estate duty in respect of that property had been raised by means of a mortgage to him." I do not understand it to be seriously doubted that an heir of entail answers to the description of a person having a limited interest. His interest, although that of a fiar, is that of a fiar limited by the prohibitive, resolutive, and irritant clauses of the title under which he holds—and it was so held by the First Division in the case of *Laurie*. (1) That being so, the only point remaining is, What is the meaning of the words "entitled to a charge"? Does this mean that he is in right of a charge; or does it mean that he is in the position to do something which will create a charge, but that until that something is done there is no charge in his favour?

I think the first alternative is the just view. In the first place, I arrive at that result viewing the matter as one of mere construction of the words used. To say that a person is entitled to a charge "as if the duty had been raised by a mortgage in his favour," seems to me clearly to denote an actual charge and not a faculty to make one. So far from agreeing with the Lord Ordinary, who thinks the words

(1) 25 R. 636.

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analogous to the words used in the entail statutes dealing with the power to charge improvement expenditure, I think they are in direct contrast to them; and the same may be said of the words authorizing the charge of widows' and children's provisions. These will be found respectively in the 18th and 21st sections of the Rutherfurd Act (1), and the words are—"It shall be lawful for the heir of entail in possession to charge." Under such a form of expression it obviously was a res meræ facultatis. Under the present the natural inference is, I think, the other way.

In the second place, I am assured by those of your Lordships who are more conversant than I am with the rules of English conveyancing that there could be no doubt that the words used would create an actual charge on English land. Primâ facie, therefore, I think it follows that the same result should be reached in Scotland.

This brings me to the last point on which really the judgment of the Court below turns. Is this question of a "charge" without any provision for its entering the records so repugnant to the law of Scotland as to exclude, so far as Scotland is concerned, the construction which the words would otherwise suggest?

The first and most obvious consideration is that the very same thing is done by the 1st sub-section of the same 9th section as regards the whole duty in a question with the Crown.

I do not find that the learned judges suggest that the charge effectuated by the 1st sub-section is a bad charge. I am not overlooking the fact that the words are slightly different—"shall be a charge" instead of "is entitled to a charge." The difference is accounted for by the fact that the nominative in the first sentence is a thing, and in the second a person. But the point, be it remembered, is not, for the moment, construction—it is feasibility. A charge which does not enter the records is, in view of our Scottish system, very inconvenient; but inconvenience is not impossibility. And I do not wonder that the judges did not express doubts as to the validity of the charge

(1) (1848) 11 & 12 Vict. c. 36.

effected by sub-s. 1, because it is only the echo of the 42nd section of the Succession Duty Act. It is every-day practice, in the investigations preparatory to preparing the conveyance following upon a minute or other bargain of sale, to ask for the succession duty accounts in order to be satisfied that this unrecorded yet possible burden does not affect the lands; and if authority for this statement be needed it will be found in the instructions to the prudent conveyancer given at p. 721 of the late Mr. Montgomery Bell's standard work on Conveyancing, where, after pointing out the possible existence of terce and courtesy (both burdens which do not enter the records), he specially adverts to the burden created by the Succession Duty Act.

But further, I think, the point is in truth necessarily decided by the case of *Laurie* (1), if that case is closely examined. In that case an entail proprietor in possession had paid the estate duty, and he presented a petition to the Court for authority to charge the estate with a bond and disposition for the amount. In his petition as first presented he founded on the Finance Act alone, and the petition was reported against as incompetent by the reporter appointed by the Court on the ground that the application clause 23 (18.) did not apply, being limited to persons in whom the estate was *not* vested, and that the statute gave no other warrant for executing a bond and disposition in security.

The petitioner then amended his petition by founding on the 11th section of the Entail Amendment Act of 1868. That section—I paraphrase it for brevity's sake—enacts that when there are entailer's debts or other debts, or sums of money which might lawfully be made chargeable by adjudication or otherwise on the fee of the estate, the Court may on the application of the heir in possession authorize bonds and dispositions in security for the amount to be placed on the estate. Upon this amendment the Court granted the prayer of the petition—the case having been reported by Lord Pearson to the First Division. The point is put clearly and in a single sentence by the Lord Ordinary, when, after quoting the 11th section

(1) 25 R. 636.

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of the Entail Act as above, he says: "The question is whether the statutory charge held by the petitioner (i.e., in virtue of the 9th section of the Finance Act) is a debt falling within that category. The reporter is of opinion that it is, and I agree with him." This is affirmed by Lord Adam, who gave the judgment of the Inner House, and who says (1): "It may be that the entail statutes did not contemplate a debt of this nature, but I am of opinion with the Lord Ordinary that it falls within the description of debts specified by the statute, that the petitioner is creditor in a debt which may be lawfully made chargeable upon the fee of the entailed estate, and therefore that the petition is competent and ought to be granted."

My Lords, I confess I am utterly unable to reconcile this with the view now taken by the same learned judge, that the debt itself is a res meræ facultatis. The only warrant for putting in force the 11th section of the Entail Act was the existence of an actual debt, not a facultative power of creating a debt. In other words, *Laurie's Case* (2) in terms decides that an heir of entail who pays the estate duty is, in virtue of the provisions of the Finance Act, in the position to lead an adjudication. But an adjudication, which is a common law remedy, can only proceed on actual as distinguished from contingent debt.

Accordingly, as I think *Laurie* (2) was well decided, it, in my judgment, rules the present case.

I cannot help adding that I think that much of the difficulty experienced by the learned judges in the Court below arises from their not having for the moment sufficiently distinguished between the question of whether a thing *is* a charge, and whether that charge is so perfected according to the forms of conveyancing as to make a marketable security good against all possible competitors. It is in this latter matter that the Scottish system of the records is so important. But the law of Scotland is not strange to rights which are truly consummated, not res meræ facultatis, but which yet are not perfected as regards security. A personal title to land is a familiar example.

(1) 25 R. 636, at p. 642. (2) 25 R. 636.

Lord Dunedin.

I do not say that the charge here is of that class. What I have said about the Succession Duty Act points the other way. But for the determination of this case it would be sufficient if the right was of that class, and the whole of the remarks as to the impossibility of a charge which did not enter the records would be beside the mark.

I think there is no room for doubt that the terms of the application clause are defective, with the result that Lord Moray's trustees have in the present case an uncomfortable security. They cannot avail themselves of the procedure in *Laurie's Case* (1), because they are not heirs of entail in possession, who alone can invoke the aid of the 11th section of the 1868 Act. But they have the benefit of *Laurie's* (1) judgment in so far as it finds that they as in right of all the assets of Earl Edmund are creditors in a debt which may be made to affect the fee by adjudication. Adjudication is not nearly such a complete or comfortable remedy to a creditor as the right of sale under a bond and disposition in security. But it is a remedy, and a remedy apart from the authority of *Laurie's Case* (1), clearly, I think, available. I pressed Mr. Clyde to say why it was not, and the only answer I understood him to give was that there was no personal debtor in the debt. But that is no answer at all; for, although such proceedings are in modern times rare owing to the practical disappearance of the cumbrous forms of security, adjudication in old days was one of the recognised modes of making effectual a real burden or debitum fundi where also there is no personal debtor in the debt: Stair, 4. 51. 11.

The result of these views is that in my judgment there is no such impossibility in the law of Scotland in holding that a "charge" can be created on land by the words of a statute without executive provisions for enabling it to enter the record, as to force me to withhold from the words what I think is their natural construction.

I am dispensed from considering the alternative view pled. On the whole matter, I am of opinion that the appeal should be allowed, and judgment given for the Crown.

(1) 25 R. 636.

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Macphail, for the respondents. My Lords, may I submit, on behalf of the respondents here, that this is not a case in which costs ought to be given against them. Apart from the circumstance that this is really a test case raised by the Crown, the conclusion of the summons is for an account, and when that account is delivered the question as to the marketability of this asset of Lord Moray's will still have to be discussed, and it may turn out that it has not got a marketable value, in which case no duty would fall to be paid. In that view the Crown would have got a valuable judgment with regard to the future; but as far as the respondents here are concerned, they would be simply in the same position as if they had succeeded in resisting this appeal. Therefore I respectfully submit that either no costs should be awarded against the respondents here, or the question of costs should be reserved until it appears what the Crown gets by way of duty. It may get none.

Scott Dickson, L.A., for the Crown (appellant). The summons here is in the usual form in which these summonses are brought, namely, calling upon the parties who are liable to pay the duty to lodge an account. The defenders here objected to lodge an account, and therefore the question considered in the Court below and by your Lordships was whether such an account should be lodged, and your Lordships have so decided. The Crown were found liable in costs in the Court below, and I see no reason why the same rule should not apply here as in the Court below.

EARL OF HALSBURY L.C. I think so.

Ordered and adjudged, that the order appealed from be reversed; and that the respondents do pay to the appellant the costs both here and in the Court below.

Lords' Journals, August 4, 1905.

Agent for appellant: *Sir Francis C. Gore, Solicitor for Inland Revenue, England, for Philip J. Hamilton Grierson, Solicitor for Inland Revenue, Scotland.*

Agent for respondents: *John Kennedy, W.S., for Melville & Lindesay, W.S., Edinburgh.*

[PRIVY COUNCIL.]

WILLIAMS . . . . . DEFENDANT;

AND

HOWARTH . . . . . PLAINTIFF.

J. C.*
1905
March 1;
July 14.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Contract with the Colonial Government for Military Service—Payments by the Imperial Government—Payments under the Contract.

Where a Colonial Government had entered into a contract with the respondent for military services in South Africa at a certain rate of pay :—*Held*, that it did so on behalf of the Crown, and that any payments made by the Crown to the respondent through the Imperial Government for services so rendered to the Crown were in part discharge of moneys due under the contract, and that the Colonial Government was entitled to the benefit of them.

APPEAL from two orders of the Supreme Court (Oct. 20 and Nov. 21, 1902) refusing (in effect) to set aside a verdict for the plaintiff entered by direction of the judge at the trial on August 25, 1902, of an action brought to recover money alleged to be due for military pay.

The respondent, a member of the second New South Wales contingent, which served in South Africa, sued the appellant, as nominal defendant on behalf of the Crown or the Government of New South Wales under the Claims against Government and Crown Suits Act of 1897, to recover the balance of pay due to him.

He alleged an agreement between him and the Government of New South Wales that, in consideration of his proceeding for service in South Africa, the said Government would grant him pay at the rate of 10*s.* per day, and the plaintiff performed his part of the contract. He claimed pay at the said rate for 490 days, namely, from December 28, 1899, to May 1, 1901, and a gratuity on discharge, and he gave credit for certain payments made by the said Government to him or to his order, and he claimed a balance due to him of 100*l.* 9*s.* The

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

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appellant denied the agreement, and at the trial contended that the Imperial pay received by the respondent, which it appeared was at the rate of 4*s.* 6*d.* a day, was paid on account of the New South Wales Government. The respondent claimed that this payment was not part of the 10*s.* a day which was still due from the local Government.

The trial judge held that there was no evidence that the Imperial Government purported to pay on behalf of the local Government, and directed a verdict for the balance claimed.

A rule nisi for a new trial was granted and discharged.

Stephen C.J. held that it might possibly have been shewn that the 4*s.* 6*d.* per day was paid by the Imperial Government on behalf of the Colonial Government, but in the absence of such evidence he could not come to the conclusion that a payment by the King of Imperial pay de facto discharged the obligation of the Colonial Government to the plaintiff. Simpson J. added that "the defendant's counsel had not raised at the trial any question that the King, being a party to the contract with the plaintiff, had in that capacity made the payments to the plaintiff, nor whether the payments were accepted by the plaintiff on account of the 10*s.* a day which the Colonial Government had agreed to pay him, and the said counsel might have purposely refrained from raising those questions from a well-grounded fear that the jury would find them against him."

Wise (*K.C. of New South Wales Bar*), *V. Hawkins*, and *H. Pollock*, for the appellant, contended that the respondent was on the contract declared upon in the service of the Crown, and that he was to be paid by the Crown. Whether he was paid out of the funds granted to the Crown by the Imperial Parliament or out of the funds granted by the Colonial Parliament was immaterial, so long as the respondent received his pay at the contract rate. He had received 4*s.* 6*d.* a day as Imperial pay and 5*s.* 6*d.* as Colonial pay. The claim against the Crown was for 10*s.* a day, and had been satisfied in full. There was no contract that he should receive anything more. No question arose as to whether the two Governments were

the agents of each other. Both were agents of the Crown, and the Crown had satisfied its obligation through one or other of them. No distinction could be drawn between the rights of the Crown in respect of Imperial rights and the rights of the Crown with regard to the Colonies. Reference was made to the New South Wales Military and Naval Forces Regulation Act, 34 Vict. No. 19 (applied to the case by a later Act, No. 12 of 1892), ss. 3, 4, and 6, under which the respondent was enrolled. Reference was made to *State of Rhode Island* v. *Massachusetts* (1); *In re Bateman's Trust* (2); *In re Oriental Bank, Ex parte the Crown* (3); *Young* v. *SS. Scotia* (4); *Sloman* v. *Government of New Zealand* (5); *Reg.* v. *Bank of Nova Scotia.* (6)

H. Terrell, K.C., and *Alfred Adams*, for the respondent, contended that under the contract he was entitled to 10*s.* a day from the Colonial Government, and that there was no evidence that the 4*s.* 6*d.* admittedly received from the Imperial Government was paid on behalf of the Colonial Government, or that the respondent accepted the payments made by that Government as payments on account of the rate of pay which the appellant had agreed to pay him. Although the respondent's services were military, the payments in question did not operate in law in part discharge of the moneys agreed to be paid by the appellant. Though the agreement was made with the Colonial Government as representing the Crown, that did not prevent the respondent from making another agreement with the Imperial Government as also representing the Crown, and the two transactions could not be mixed together so as to prevent their being separately fulfilled, and so as to make a payment by the one Government tantamount to a payment by the other. Reference was made to *Farnell* v. *Bowman.* (7)

Counsel for the appellant were not heard in reply; and their Lordships intimated that they would report at once to His Majesty that the appeal be allowed.

(1) (1838) 36 Sup. Ct. U. S. 657, 720, 738.
(2) (1873) L. R. 15 Eq. 355.
(3) (1884) 28 Ch. D. 643.
(4) [1903] A. C. 501.
(5) (1876) 1 C. P. D. 563.
(6) (1885) 11 Can. Sup. Ct. Rep. 1, 10.
(7) (1887) 12 App. Cas. 643.

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WILLIAMS v. HOWARTH.

July 14. The reasons for that report were at a later date stated by

THE LORD CHANCELLOR. In this case their Lordships have already reported to His Majesty their opinion that the judgment appealed against cannot be supported.

The plaintiff was in the service of the Crown, and his payment was to be made by the Crown. Whether the money by which he was to be paid was to be found by the Colony or the Mother Country was not a matter which could in any way affect his relation to his employer, the Crown.

The learned Acting Chief Justice in giving his judgment in this case said: "The King has no concern with payments for services rendered in this Colony; the obligation is with the Government of New South Wales," and, so far as their Lordships can understand, this is the ground upon which the judgment rests. But with great respect to the learned judge, this is entirely erroneous. The Government in relation to this contract is the King himself. The soldier is his soldier, and the supplies granted to His Majesty for the purpose of paying his soldiers, whether they be granted by the Imperial or the Colonial Legislature, are money granted to the King, and the Appropriation Act, whenever an Appropriation Act is passed, simply operates to prevent its being applied to any other purpose.

Under these circumstances the money paid was money paid for the service rendered to the King, and no other payment could possibly be due upon the contract declared on.

Their Lordships have accordingly humbly advised His Majesty that the judgment of the Supreme Court ought to be discharged except as to costs, and that the verdict entered for the respondent ought to be set aside and a verdict entered for the appellant. Having regard to the terms on which the appellant was given special leave to appeal, their Lordships think that the respondent's costs of this appeal as between solicitor and client should be paid by the appellant.

Solicitor for appellant: *G. M. Light.*
Solicitor for respondent: *G. Slade.*

[PRIVY COUNCIL.]

MOLYNEUX . . . . . DEFENDANT; J. C.*
1905
AND
June 6, 7;
July 3.
NATAL LAND AND COLONIZATION COMPANY, LIMITED . . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF NATAL.

Law of Natal—Contract by Insane Person is void, not voidable—Bond passed under Power of Attorney granted by Insane Person—Rights of Negotiorum Gestor.

By the Roman-Dutch law, which prevails in Natal, a mortgage bond passed by virtue of a power of attorney executed by an insane person is not legally enforceable where it appears that the mortgagor derived no benefit from the bond, and that the mortgagee had no knowledge of the insanity. According to the authorities of that law, a contract made by an insane person is void and not voidable only.

Where moneys so advanced are devoted to purposes beneficial to the insane person, the Roman-Dutch law recognises the equity of allowing them to be recovered, as moneys expended in good faith by his negotiorum gestor.

APPEAL from a judgment of the Supreme Court (Sept. 30, 1903) for 4600*l.* with interest and costs, the amount of a mortgage bond by Henry Cowey, deceased, dated February 21, 1901, and declaring the property hypothecated thereby to be executable.

The appellant, as executor dative of the estate of the said Cowey, contended that he became of unsound mind (mente captus) before November 17, 1897, on which date he executed the general power of attorney to his son A. W. Cowey under which it was passed, and continued in that condition till his death, and in particular was of unsound mind on November 17, 1897, and February 21, 1901, both mentally and physically incapable of transacting business. In the mortgage bond it was recited that the same was executed by Cameron under a special power of attorney executed by A. W. Cowey under his

* *Present:* LORD MACNAGHTEN, LORD DAVEY, SIR HENRY DE VILLIERS, and SIR ARTHUR WILSON.

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general power. The questions decided in the appeal were of fact as regards Cowey's state of mind at the said dates, and of law as to the effect thereof upon the said transactions.

The majority of the Court (Finnemore and Beaumont JJ., Bale C.J. dissenting) arrived at the following conclusions :—

"(1.) That the respondent company through their agent Rycroft advanced to A. W. Cowey, on behalf of Henry Cowey, the sum of 4600*l.* (2.) That the money was advanced in the bonâ fide belief that A. W. Cowey was acting under his father's general power of attorney, and without knowledge of any fraud on the part of the agent, or want of understanding on the part of the principal. (3.) That Henry Cowey was insane in 1901, but that the company and their agent had no knowledge, or notice, or reason to suspect his insanity, and that they acted bonâ fide throughout the whole transaction. (4.) That it has not been shewn that Henry Cowey was insane or incapable of understanding any business transaction in 1897 when he gave his general power of attorney to his son A. W. Cowey. (5.) That the evidence as to Henry Cowey's insanity at the time when the loans were made is inconclusive, but that, even if it be held that he was insane at that time, the general power of attorney under which A. W. Cowey received the loan of 4600*l.* was effectual so far as the company are concerned in this action."

On the other hand, the conclusion of the Chief Justice was :—

"Being therefore satisfied that when the general power of attorney was granted Henry Cowey was of unsound mind (mente captus)—that the disease was progressive and continuous—that consequently he was also of unsound mind when the loans were effected and the special power of attorney, dated February 13, 1901, was signed—that he derived no benefit whatever from the loans which were ultimately secured or purported to be secured by the bond sued on, I am of opinion that under our law, notwithstanding Mr. Rycroft's want of knowledge, the plaintiff company is not entitled to judgment. In any case, the conduct of Arthur Ward Cowey was such that I think Mr. Rycroft ought to have been put upon inquiry, and if he had made inquiry, then I can have no doubt whatever that he would have discovered that Henry Cowey had

received no benefit from the loans, and was quite incapable through unsoundness of mind of contracting. I think, therefore, that the defendants should be absolved from the instance."

Levett, K.C., and *Christopher James*, for the appellant, contended that the evidence shewed that at the material dates above mentioned Henry Cowey was mente captus and of unsound mind, and incapable of understanding the transactions of the general and special power of attorney and of the bond. The result was that by the law of the Colony those documents were void and of no effect. They submitted that the Chief Justice was right in his conclusions, and referred to Sandar's Justinian, as to Curators, bk. i. tit. 23, ss. 3 and 4; bk. iii. tit. 19, s. 8. As to "furiosi" having no power to contract, see Digest, bk. xii. s. 1, sub-s. 12; bk. xxvii. s. 10, sub-s. 10; bk. xxix. s. 2, sub-ss. 47, 48; bk. xliv. s. 7, sub-ss. 1, 24, 46; bk. l. s. 17, sub-ss. 5, 40; 2 Voet on the Pandects, bk. 27, tit. 10, sub-s. 3; Cujacius, ed. 1618, vol. iii. p. 907, on Digest, xliv. 7. 46; Hunter's Roman Law, 4th ed. p. 606; Sohm, Inst. Roman Law, p. 140, s. 44, p. 228; Salkowski, Roman Private Law, p. 296; Van Leewen (Kotzé), vol. ii. p. 10. With regard to the English law upon the same point, see *In re McLaughlin* (1); *Beverley's Case* (2); *Molton* v. *Camroux* (3); *Drew* v. *Nunn* (4); *Imperial Loan Co.* v. *Stone*. (5) Even if the general power of attorney was found to have been executed by H. Cowey while of sound mind, it was revoked by his subsequent insanity before the advances made. Moreover, Rycroft's knowledge of his insanity was immaterial; otherwise the circumstances put him on his inquiry. It was proved that H. Cowey received no benefit from any of the advances. There was no foundation for the doctrine that the power in this case was voidable only and not void ab initio.

Rowden, K.C., and *MacSwinney*, for the respondents, contended that the evidence shewed that they had through Rycroft advanced the moneys sought to be recovered to A. W. Cowey

(1) (1904) Common. Aust. Rep. 1; S.C. [1904] A. C. 776.
(2) (1603) 4 Rep. 123 b.
(3) (1849) 4 Ex. 19.
(4) (1879) 4 Q. B. D. 661.
(5) [1892] 1 Q. B. 599.

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as the duly constituted and authorized attorney of Henry Cowey for the use and benefit of his principal. The advances and the bond in suit were authorized by the terms of both the general and the special power of attorney, and independently of both those powers the acts and conduct of Henry Cowey constituted an implied authority to his son to pledge his credit and bind his property. The evidence shewed that at the dates of the general and special power, of the bond, and of the advances Henry Cowey was compos mentis and understood what he was doing, and also what his son was doing on his behalf. There was no sufficient evidence to the contrary; but even if there were, the respondents had no knowledge of the fact, nor had they any suspicion of it, nor were there any circumstances to put them on inquiry. The practical question was which party should suffer the loss which resulted from the transaction and A. W. Cowey's fraud—the estate of Henry Cowey or the respondents. It was contended that, as between that estate and the respondents, the fact that the advances were made by the latter under powers of attorney which purported to be duly made without knowledge of any fraud or notice of any revocation, under circumstances which led them to believe that the son either had authority or was held out to the knowledge of those interested in the estate as having authority, entitled them to recover. The Roman-Dutch law does not differ from English law on the points raised in this case. Reference was made to *Banks* v. *Goodfellow* (1) and the case cited by the Chief Justice of *Harwood* v. *Baker* (2) as to the degree of mental unsoundness which destroys legal capacity. See also *Jenkins* v. *Morris*. (3) Reference was also made to *Hambro* v. *Burnand* (4); *Henderson & Co.* v. *Williams*. (5)

Levett, K.C., replied.

1905 *July* 3.

The judgment of their Lordships was delivered by

SIR HENRY DE VILLIERS. This appeal raises several important questions of fact and of law; but the main question

(1) (1870) L. R. 5 Q. B. 549, 568.
(2) (1840) 3 Moo. P. C. 282; 50 R. R. 37.
(3) (1880) 14 Ch. D. 674.
(4) [1904] 2 K. B. 10.
(5) [1895] 1 Q. B. 521, 529.

to be decided is whether, under the law of Natal, where the Roman-Dutch law prevails, a mortgage bond passed by virtue of a power of attorney executed by an insane person is legally enforceable if the mortgagor derived no benefit from the bond and the mortgagee had no knowledge of the insanity.

The declaration in the action alleged that there was owing to the plaintiff (now respondent) company by the defendant (now appellant) as executor dative of the estate of the late Henry Cowey, the sum of 4600*l.*, with interest thereon, for money lent to the late Henry Cowey, in security whereof he had passed his mortgage bond dated February 21, 1901. The prayer was for judgment for the amount and for an order declaring the property mortgaged to be executable. The defence was that, at the date of the passing of the bond and upon the granting of the power of attorney under which the same was passed, the late Henry Cowey was mentally and physically incapable of conducting business or of understanding the nature and effect of the bond or of the power of attorney signed by him, and that such mental and physical incapacity was well known to the plaintiff company and its manager at Durban, John William Rycroft. The plea further stated that Henry Cowey did not receive any value for the bond; that the amount said to be due for money lent had not in fact been lent by the plaintiff company to or for the benefit of Henry Cowey, as was well known to the company and its manager, and that the bond had been obtained by the manager in collusion with one Arthur Cowey, son of Henry Cowey, to cover and secure debts due by Arthur Cowey to Rycroft or the plaintiff company.

At the trial before the Chief Justice and Finnemore and Beaumont JJ. the charge of collusion was withdrawn. In regard to the mental condition of Henry Cowey at the date of the granting of the power of attorney in 1901 the judges were agreed that he was then of unsound mind, and the evidence fully supports that finding. Two of the judges, however, found that it had not been proved that Henry Cowey was insane at the time when the plaintiff company made the loans to Arthur Cowey upon the faith of a general power of attorney, bearing date November 17, 1897, from Henry Cowey, held by

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Arthur Cowey and shewn to Rycroft, the plaintiff company's manager. The Chief Justice, on the other hand, was satisfied that on November 17, 1897, Henry Cowey was already of unsound mind (mente captus); that the disease of senile dementia, from which he was suffering, was progressive and continuous, and that consequently he was also of unsound mind when the loans were effected. There was also some difference of opinion upon the question whether Henry Cowey derived any advantage from the loans secured by the bond, but their Lordships are satisfied from the evidence that the money raised by Arthur Cowey was solely and fraudulently devoted to his own business purposes. In regard to the allegation in the plea that Rycroft was aware of Henry Cowey's mental incapacity and of the fact that the money had not been lent to or for the benefit of Henry Cowey, the three judges were agreed that Rycroft had not such knowledge; but the Chief Justice, differing in this respect from his learned colleagues, held that the facts disclosed to Rycroft should have put him to inquiry, and that, if he had made inquiry, he would have discovered that Henry Cowey had received no benefit from the loans, and was quite incapable, through unsoundness of mind, of contracting. The Court, by a majority, the Chief Justice dissenting, gave judgment for the plaintiff company, as prayed, with costs.

Upon the pleadings and the facts just stated, the simple question for decision was whether the executor dative of the estate of Henry Cowey, who had received no benefit from the loan of 4600*l.*, was liable on a bond to secure such loan, passed by virtue of a power of attorney executed by the deceased at a time when he was insane, in favour of the plaintiff company, which had no knowledge of such insanity. The authorities cited in the Natal Court and before their Lordships leave no doubt as to what the answer to the question should have been. In Justinian's Institutes (3. 19. 8) it is laid down that an insane person cannot transact any business whatever; in the Digest (44. 7. 1, § 12) a passage from Gaius is quoted with approval to the effect that it is self-evident that a stipulation and a promise made by an insane person are equally of no effect; and in another passage of the Digest (50. 17. 5) it is

laid down, as one of the well-established rules of the ancient law, that an insane person cannot bind himself in any way by contract. This principle was incorporated in the law of the Netherlands, and none of the writers on that law cited before their Lordships introduced the qualification that the person dealing with the insane person must be aware of the insanity in order to render the contract void. Grotius, in his treatise De Jure Belli et Pacis (ii., 11, 5) says that the use of reason is the first requisite to constitute the obligation of a promise, which a madman, idiot, and an infant are consequently incapable of making: "Primum requiritur usus rationis; ideo et furiosi et amentis et infantis nulla est promissio." Vinnius in his book De Pactis (C. 14, s. 1) says that an insane person is considered in regard to all matters as being absent, asleep, and unaware of what is being done, and he elsewhere applies the same doctrine to persons who, although not lunatics in the sense of being furiosi, are mente capti or dementes in the sense of being destitute of any reason or intelligence. The only point upon which any doubt has been expressed by some of the commentators is whether the incapacity caused by insanity affects the validity of acts done by an insane person before he has been judicially declared to be insane and a curator appointed over him. This doubt was not shared in by Voet, who in his Commentaries (27. 10. 3), after saying that curators are placed over insane persons who are of age, adds that, as they are incapable of giving any consent, every contract made by them, even before the appointment of curators, is ipso jure null and void. That the civil law was understood in the same sense by Pothier is clear from the following passage in his work on Obligations (s. 51): "All contracts pretended to be made by persons interdicted for insanity, though before interdiction, are null, provided it be shewn that they were insane at the time of the contract, for then insanity alone, and of itself renders them incapable of contracting, independently of the sentence of interdiction, which is merely a declaration of insanity." In the present case curators were appointed over Henry Cowey by reason of his insanity, but the appointment was made after the passing of the bond. In the opinion of their Lordships,

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however, this fact cannot affect the validity of the bond if the insanity existed—as in fact it did—when the power authorizing the bond was executed. No evidence was given as to whether Henry Cowey understood the terms of that power, and, in fact, no witness was called to prove its due execution. If signed by Henry Cowey, it was so signed at a time when he was suffering from senile dementia, and, in the absence of proof that he understood the document and knew what he was doing, the presumption is that the total absence of a reasoning mind which then existed would have prevented him from grasping its contents.

The learned judges whose opinions prevailed in the Court below made the following remarks in their joint reasons :—

"All our authorities agree in laying down the general rule of law that obligations entered into with a lunatic must, primâ facie, be regarded as null and void, because of his incapacity to give a valid consent . . . . But whilst this general rule or principle cannot be denied and is common to all civilized systems of jurisprudence, our law, and the works of the learned Roman and Dutch jurists and commentators deal lightly, or not at all, with the question as to whether such a contract is absolutely void under all or any circumstances, or whether it may, in certain cases, be held to be voidable only, whether, for instance, a want of knowledge by one of the parties of the insanity of the other party to a contract affects the validity of the contract."

They then proceed to say that when the Dutch law is silent the Court has to fall back on the Roman law, and that when that law is also silent the Court should be guided by the English law, and they continue thus :—

"It is now settled law in England that such contracts are not void but voidable at the option of the lunatic; but this only if his state was known to the other party and if he derived no benefit from it."

Without inquiring whether this is a correct statement of the law of England, it is sufficient for their Lordships to say that the Roman-Dutch law is not silent upon the question whether a contract made by an insane person is voidable only, for the

authorities expressly say that it is absolutely void. Where acts have been done on behalf of an insane person by virtue of a power of attorney given by him before he was bereft of his reason, there are authorities (such as Digest 46, 3, 32, and Pothier on Obligations, s. 81) from which it might be fairly inferred that want of knowledge regarding the principal's change of condition would protect persons dealing with the agent. The power is revoked by reason of the insanity; but if the power held out the agent as a person with whom third parties might contract as such until they receive notice of the revocation of the authority, their knowledge of the insanity would have an important bearing on their right to recover upon a contract thus made. That would, however, be a very different matter from saying that an agent appointed after the insanity of the principal could, under the Roman-Dutch law, validly bind such principal. Not a trace, so far as their Lordships are aware, is to be found in that law of the rule, which has sometimes been stated to be part of the law of England, that a person cannot stultify himself by pleading that he was insane at the time when he purported to enter into a contract. But even if the law of England had been applicable to the present case, their Lordships are unable to agree with the majority of the Natal Court that the bond sued upon would have been enforceable. In the case of *Daily Telegraph Newspaper Co.* v. *McLaughlin* (1) this Board refused to give leave to appeal from a judgment of the High Court of Australia in which it had been held, in a suit for the rectification of a share register, that a power of attorney executed by the plaintiff when he was a lunatic and did not understand what he was doing was void, and that the transfer of the plaintiff's shares effected by the defendant company under such power of attorney was a nullity, although the company had no notice of the insanity. In stating their Lordships' reasons for refusing such leave to appeal Lord Macnaghten said:—

"Their Lordships, having had the advantage of hearing argument on both sides, see no reason to doubt that the judgment of the High Court is right . . . . The risk to a company

(1) [1904] A. C. 776.

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acting on a power of attorney is no doubt considerable, but the directors can protect themselves to some extent by making careful inquiries—a precaution apparently not taken in the present case."

If Rycroft had made the slightest inquiry he would have ascertained that Henry Cowey was not in a fit mental condition to execute the power of 1901, and, in any case, Rycroft's ignorance of the fact cannot confer validity on an instrument which was otherwise invalid.

It follows, therefore, that if the evidence in the present case had been confined to the issues raised by the pleadings, it would have been impossible to support the judgment of the Natal Court. It appears, however, that the evidence actually given extended over a wider range, and embraced the further questions whether Henry Cowey had given a general power of attorney to his son Arthur in 1897, whether the loans were made by Rycroft upon the faith of such power, and whether at the date of that power and of the loans Henry Cowey had already lost the use of his reason. This additional evidence seems to have been let in in the following manner. Rycroft, who was the only witness called for the plaintiff company, merely produced the bond, and stated that no interest had been paid thereon after December 31, 1901. He was then minutely cross-examined as to the consideration for the bond, and, in the course of such cross-examination, he stated that the loans had been made upon the faith of a general power of attorney held by Arthur Cowey from his father. He said that he had seen the power, but had not obtained possession of it. He did not mention the date of the power, and the only description which he could give of it was that, so far as his memory served him, it was on the usual printed form. The original was not produced at the trial, but the registrar of deeds produced the copy of a general power which had been lodged in the Deeds Office at the time when a bond for 7500*l.* was passed on behalf of Henry Cowey under a special power executed by Arthur Cowey, as agent for Henry Cowey under the general power. That general power purported to be dated on November 17, 1897, and as its terms were admittedly wide enough to autho-

rize Arthur Cowey to pledge his father's credit, it became important for the defendant to shew that it was executed at a time when Henry Cowey's malady had already been established. The consequence was that the further cross-examination of Rycroft and the examination-in-chief of the defendant's own witnesses travelled beyond the issues raised by the pleadings, and all the learned judges treated the case as if the validity of the general power of 1897 were one of the questions at issue.

The evidence as to the genuineness of that general power is extremely meagre, and the utmost that can be stated with any degree of certainty is that on June 19, 1899, on which day the copy was filed with the registrar of deeds, there was a document in the possession of Arthur Cowey purporting to be such a general power. It was proved that Arthur Cowey had been convicted of the forgery of other documents, and the fact, therefore, that the original was shewn by him to the registrar of deeds does not necessarily prove that it was genuine or that its date was correctly stated. The doubt which exists upon these points is strengthened by the evidence of Miss Matcham, whose name appears as a witness to Henry Cowey's signature of the alleged general power. She was not produced as a witness by the plaintiff company, upon whom the burthen of proving the execution of the power clearly lay, but by the defendant, who examined her as to the mental condition of Henry Cowey from 1893, when she became his housekeeper, until his death in 1902. In cross-examination she was asked whether she had ever seen Henry Cowey sign a paper, and she said she had once seen him sign a blue paper, which was doubled up, but she did not know what it was. Asked when it was, she said she could not say, but that it was some years before his death. In the course of her re-examination she said that she remembered having once witnessed Henry Cowey's signature; but that the document was not read over, and that she had not the least idea what it was. She did not know when it was, but she was quite certain it took place after the fire which destroyed the premises belonging to Henry Cowey in which Arthur carried on his own business. She was certain it was after the fire, because the signing took place in the new

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premises rebuilt after the fire. If her evidence on this point was correct, the document which she witnessed could not have been executed before 1899. Whatever may have been the mental condition of Henry Cowey in 1897, their Lordships are satisfied, from the evidence of Miss Matcham and the other witnesses, that in 1899 his malady had reached a stage which entirely incapacitated him from understanding the nature of the act he was performing.

It seems, however, to have been assumed in the Court below that the general power was signed by Henry Cowey on the day on which it purports to have been executed, namely, on November 17, 1897, and their Lordships, therefore, proceed to consider whether he was then in a fit mental condition to execute a valid power of attorney. He was then about eighty years of age, and had retired from business as a grocer seven years previously, after giving public notice of his retirement and of the transfer of the business to his son Arthur. The premises in Durban, in which the business was carried on, belonged to Henry Cowey, but he had no further interest in the business, which, however, continued to be carried on under the name of "Henry Cowey." He himself lived on the Berea, and, as his wife had died before his retirement, he employed Miss Matcham as his housekeeper. He seems never to have taken medical advice himself, but at the request of members of his family Dr. Campbell, a physician practising at Durban, used to pay him occasional visits. As far back as 1887 Dr. Campbell had to warn Henry Cowey's attendants to be particular in their supervision of him in case he should wander away in the night and injure himself. In 1895 Henry Cowey had an accident with his carriage which ran over and injured a man, and this is what the doctor says as to his mental condition at that time:—

"He told me that the accident had been a kind of judgment to the man he had run over, and that, in the hands of Providence, he had been the means of compelling this man to realize his sins, and that he felt his position keenly in regard to this particular matter, and hoped that it would be for the ultimate benefit of this man that he had been knocked over. On another

occasion he mistook me for a policeman. During my visits I found generally that he was not able to fix his conversation in any particular direction for any length of time. After my telling him that I was not a policeman, he appreciated the fact and shook me by the hand and was very glad to see me. Later on in the conversation he would forget that, and I had to remind him of my identity again. All these points led me to the conclusion that Henry Cowey was not in what one would call his right mind."

Later on the witness said that instead of improving his patient got very much worse after this time, and that during the last four or five years of his life his mental condition would have justified a medical certificate that he was not in a fit mental state to look after himself. In cross-examination the doctor admitted that, in his opinion, the meaning of the document authorizing the bond of 4600*l.* could have been conveyed to Henry Cowey in January, 1901; but that was the date when, according to the unanimous finding of the Court, he "was non compos mentis and could have had no idea of what he was doing." The doctor pointed out the difficult position he was in, as he had never seen the man's mental condition tested by a proposition of this kind. The capacity of Henry Cowey to understand the alleged general power of 1897 can only be tested by his general mental condition at that time, seeing that the plaintiff company produced no evidence as to whether he understood the document itself. A witness, William Smith, who had known Henry Cowey familiarly from the year 1890, said that in 1895 he saw a very great change in him, and that after that date he could not do any business. On one occasion, for instance, he offered the witness a sixpence for painting the whole of his house and stable. Further on the witness said:—

"At that time he was continually up and down out of bed. I undressed him. He seemed to have no idea of undressing, and I put him to bed; but of course I had to lie awake practically the whole night, because he was up a good many times with a lighted candle and I was afraid he would set himself on fire. In the morning I got him up and took him to the bath. It was his custom to sit in cold water for an hour and a half. I

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did not allow him to do that. When I thought he had enough I brought him out and put his clothes on and made him presentable. . . . On several occasions when the kafir was working in the grounds the old man would persist in wheeling the barrow and carrying the kafir's tools."

The hairdresser, Cartledge, gave evidence as to the old man's incapacity to perform such a simple act as paying for his shaving, and said he was unfit for business, was incompetent to buy or sell things, and did not know the days of the week. Asked what period he was speaking of, the witness said, "1897, 1898, 1899," and in answer to the question, "Why do you exclude 1900?" he said, "He was too bad to talk to then at all." Another witness, Samuel Roberts, said that from the year 1890 H. Cowey's mental faculties were gradually failing, and gave several instances of such failure. Albert Wood, son-in-law of the old man, said that he noticed his mind beginning to give in about 1895, and that a remarkable change for the worse took place in 1896. Further on, the following evidence appears on the record :—

"(*Q.*) You have a daughter named Ivy. Did Mr. Cowey come down at any time?—(*A.*) He came down to her funeral. (*Q.*) Is she still alive?—(*A.*) Yes. (*Q.*) Was he properly attired for a funeral?—(*A.*) Yes, he had his black suit on and a silk hat. (*Q.*) He did not usually wear a silk hat?—(*A.*) Only at funerals. (*Q.*) What did he bring with him?—(*A.*) A very large pumpkin. (*Q.*) What year was this?—(*A.*) 1897."

It is not necessary for their Lordships to refer to the many other occasions mentioned by the witnesses on which the deceased shewed by his conduct that he had entered his second childhood before November, 1897, and was wholly unfit to transact business of any kind. There was no question as to the credibility of the witnesses, but rather as to the inference which might fairly be drawn from the uncontradicted testimony of the different witnesses. After a careful consideration of the whole of the evidence, their Lordships are unable to arrive at any other conclusion than that, at the date of the alleged general power of attorney, Henry Cowey's progressive malady

had reached a stage which rendered him mentally unfit to consent to the execution of the power. It was not a case of partial insanity or of mere delusions acting on a mind otherwise sane, but a complete and general enfeeblement of the mental powers. His capacity for reasoning or for carrying on business of any kind was completely gone, and, in the absence of any proof that he understood the terms of the power, the presumption is that he was wholly incapable of understanding it.

It has been urged before their Lordships that, as the general power of attorney was deemed sufficient to authorize the mortgage bond of 7500*l.*, it should be held equally effectual to authorize the passing of the bond now in question. The validity of the bond for 7500*l.* is not now before their Lordships, but it is right to say that it was clearly proved that the money thus raised was devoted to paying off bonds on Henry Cowey's property and rebuilding his burnt premises. The Roman-Dutch law, while denying the capacity of an insane person to bind himself by contract, recognizes the equity of allowing a person who has in good faith expended money on behalf of a lunatic to have his expenses recouped. A person may, for instance, become negotiorum gestor for a lunatic, and, although he acts in such a case without any mandate whatever, he can recover all sums legitimately expended on behalf of such lunatic (Dig. 3. 5. 3, s. 5). It may well be that, upon analogous principles, the mortgagee, under the bond of 7500*l.*, can recover that amount from the executor, but it would by no means follow that the plaintiff company is entitled to recover the amount of a loan raised in Henry Cowey's name and ostensibly on his behalf, but no part of which was used for his benefit. In order to render his executor liable, proof of a valid mandate to raise the loan is clearly necessary, and there can be no valid mandate from a person who, by reason of his mental disease, is incapable of giving his consent thereto.

The result is that their Lordships will humbly advise His Majesty that the appeal should be allowed, and judgment of absolution from the instance entered, and that the plaintiff

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company should pay the costs in the Court below. The company will also pay the costs of this appeal.

Solicitors for appellant: *Budd, Johnson & Jecks.*
Solicitors for respondents: *Kimbers & Boatman.*

[PRIVY COUNCIL.]

J. C.* 1905 *July 6, 7; Aug. 2.*

ROSS . . . . . APPELLANT;

AND

BEAUDRY AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH (APPEAL SIDE), QUEBEC.

Law of Lower Canada — Distribution of Insolvent's Estate — Landlord's Privilege—Effect of 61 *Vict. c.* 46*—Retrospective Legislation.*

Where insolvent tenants judicially abandoned their property for the benefit of their creditors and statute law (61 Vict. c. 46) at the date of the abandonment restricted the lessor's preference to two years' rent, ranking them as ordinary creditors for the balance, while no such restriction was enacted by the law as it stood at the date of the leases:—

Held, that the existing statute applied to all liquidations which arose after its enactment, and governed the lessor's privilege unless expressly excepted therefrom.

APPEAL from a judgment of the above Court (Jan. 20, 1903) reversing a judgment of the Superior Court (May 5, 1902).

The respondents as lessors of property rented under two deeds of lease to the insolvents, for whose estate the appellant was appointed curator under the Quebec Civil Procedure Code, filed a claim with the appellant claiming to be paid by privilege out of the proceeds of the assets which were upon the leased premises at the time of the abandonment of their property by the insolvents the sum of $7627.66, being rent, interest, and taxes up to May 1, 1900, which included all arrears of rent due to them by the insolvents.

The appellant denied the privilege for more than two years.

It appeared that 61 Vict. c. 46 was the enactment in force

* *Present:* LORD DAVEY, LORD JAMES OF HEREFORD, LORD ROBERTSON, and SIR ANDREW SCOBLE.

at the date of the insolvency. It amended the law as it stood at the date of the leases. The question at issue was whether the amending Act governed the liquidation. The first Court ruled that it did; the appellate Court held that it had not by its terms declared that it should have a retroactive effect, and therefore that it could not affect rights which had already been acquired at the date of its coming into force.

Atwater, K.C., and *Campbell, K.C.*, for the appellant, contended that the judgment of the Superior Court should be restored, for that the law in force at the time of the insolvency should prevail in the liquidation of the insolvents' property as between the landlord and other creditors. The Act of 1898 was intended to limit the excessive privilege of the landlord as granted by the earlier legislation, and expressly applies to every case where the abandonment has been thereafter made. No exception is made in favour of the lessor's privilege theretofore existing. That privilege was not a vested right, nor was it created by contract; it was the creature of statute. The lessor has only such privilege as the law of distribution for the time being allows. The appellant as curator was bound to distribute according to the law existing at the time of the liquidation, and can only recognise the landlord's privilege so far as the then existing law allows it. That law was a general law, and applied generally from the date of its coming into force. The curator did not seek to give it a retrospective effect, but the respondents had not shewn that they were excepted from its operation. They referred to *Page* v. *Bennett* (1); Quebec Civil Procedure Code, art. 2005, and arts. 1981, 1982, 1983; 61 Vict. c. 46.

R. C. Smith, K.C., and *Lamothe, K.C.*, for the respondents, contended that Act 61 Vict. c. 46 is not retrospective or retroactive, and does not affect rights which had accrued and existed at the date of its coming into force. The landlord's privilege is not denied by the appellant, but it is contended that its extent has been curtailed even for arrears of rent theretofore due by the amending Act of 1898. It was contended that

(1) (1860) 29 L. J. (N.S.) (Ch.) 398.

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any provincial law regulating insolvency was ultra vires, as the Dominion had exclusive right to legislate on that subject: see British North America Act, 1867, s. 91, sub-s. 21. Reference was made to the Quebec Civil Code, arts 1619, 1622. Art. 2005, reproduced in art. 5828 of the Revised Statutes of Quebec, was in force at the date of the leases to the insolvents. The respondents' privilege was created thereunder, and their vested rights were not affected by the amending Act (which did not come into effect until March 16, 1898) in the absence of an express provision to that effect. English and French law are the same as regards statutes, having no retrospective operation unless it is specially provided to that effect. Reference was made to *Aylwin* v. *Gilloran* (1), to art. 1994 of the said Code, and to *McWilliam* v. *Osler* (2), *Vallière* v. *Carrier* (3), *Claxton* v. *Glover* (4), *Vineberg* v. *Barton* (5), *Dallaire* v. *Gauthier*. (6) Privilege can be created by contract, and was so created in this case. Reference was also made to *Gardner* v. *Lucas* (7); *Young* v. *Adams* (8); *In re Bulmer, Beaudry* v. *Ross*. (9)

Atwater, K.C., replied.

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The judgment of their Lordships was delivered by

LORD ROBERTSON. The appellant is curator of the insolvent estate of John A. Bulmer & Co., lumber merchants in Montreal, and the respondents were lessors of property occupied by that firm for the purposes of its business. On May 19, 1899, Bulmer & Co. made a judicial abandonment of their property for the benefit of their creditors under art. 853 of the Code of Civil Procedure, and at that date they were owing the respondents rent for several years. The respondents claimed for the whole of these arrears as privileged creditors; but the appellant gave them preference only for two years' rent, ranking them

(1) (1854) 4 L. C. R. 360.
(2) (1892) 2 Quebec L. R. Sup. Ct. 126.
(3) (1894) 6 Quebec L. R. Sup. Ct. 1.
(4) (1894) 6 Quebec L. R. Sup. Ct. 227.
(5) (1895) 7 Quebec L. R. Sup. Ct. 448.
(6) (1903) 24 Quebec L. R. 24 Sup. Ct. 495.
(7) (1878) 3 App. Cas. 582.
(8) [1898] A. C. 469, 476.
(9) (1903) Quebec 12 K. B. 334.

as ordinary creditors for the balance. The ground of the appellant's decision is the simple one that, in limiting the landlord's privilege to two years, he obeyed the section of the Civil Code governing the liquidation of property abandoned by insolvent traders at the date of Bulmers' abandonment of their property. The contention of the respondents, on the other hand, is that the measure of their preference must be held to have been fixed by the law as it existed at the date of the leases under which the property was held, and that the Code as it stood then made no limitation to two years' rent, the rule founded on by the appellant having been introduced into the Code between the dates of the leases and the date of the abandonment of their property by Bulmers. The question in dispute was, therefore, a short and distinct one.

The appellant's decision that the respondents were entitled to privilege only for two years' rent was given on February 5, 1902. The respondents appealed to the Superior Court, and judgment was given by Archibald J. on May 5, 1902, dismissing the appeal. Appeal having been taken to the Court of King's Bench, the judgment of Archibald J. was reversed on January 20, 1903.

The sole question being whether the rights of the respondents are measured by the statute law as it stood when the leases were granted, or as it stood when the insolvent tenants abandoned their property, it is convenient to set out the two contrasted enactments. At the date of the leases art. 2005 of the Code was as follows:—

"2005. The privilege of the lessor extends to all rent that is due or to become due, under a lease in authentic form.

"But in the case of the liquidation of property abandoned by an insolvent trader who has made an abandonment in favour of his creditors, the lessor's privilege is restricted to the whole of the rent due and to become due during the current year, if there remain more than four months to complete the year; and if there remain less than four months to complete the year, to the whole of the rent due and to the rent becoming due during the current year and the whole of the following year.

"If the lease be not in authentic form, the privilege can

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only be claimed for three overdue instalments and for the remainder of the current year."

The same article, as amended by 61 Vict. c. 46, now reads as follows:—

"2005. The privilege of the lessor extends to all rent that is due or to become due under a lease in authentic form.

"But in the case of the liquidation of property abandoned by an insolvent trader who has made an abandonment in favour of his creditors the lessor's privilege is restricted to twelve months' rent due and to rent to become due during the current year if there remain more than four months to complete the year; if there remain less than four months to complete the year, to the twelve months' rent due and to the rent of the current year and the whole of the following year.

"If the lease be not in authentic form, the privilege can only be claimed for three overdue instalments and for the remainder of the current year."

A comparison between the two enactments shews that the parties are right in saying that the soundness of the judgment now under review depends solely on the question which of the two forms of art. 2005 is applicable to the case.

The decision of the Court of King's Bench purports to proceed on the well-established principle that legislation is presumed not to be retroactive in its effect on existing rights; and this principle is enforced and elucidated at length in the judgment. In applying this doctrine, however, the learned judges do not, as it appears to their Lordships, sufficiently advert to the question, To what subject-matter does the new paragraph in art. 2005 primarily relate? The new enactment is directed to the regulation of the liquidation of traders' abandoned properties and the relations arising in liquidation between the lessor of properties and the general body of creditors. Accordingly, primâ facie, the true application of the doctrine against the retroaction of laws is to confine this particular enactment to liquidations arising after the amendment of the law. The question whether there shall be a further limitation of the enactment by excluding lessors whose leases are dated prior to the amending Act stands in a very different

position, and the intention of the Legislature must be derived, as in every case, from the language and the subject-matter of the enactment. Now, it is to be observed that the right now insisted for by the landlord was derived, not from the terms of the lease, but from the general law as expressed in the Code. In the earlier form of art. 2005 (as it stood at the date of the leases) there was one regulation of the effect of abandonment by a trader on the relative position of creditors; in the new form of the article there is a different one. Now, it is extremely difficult to suppose that it was intended that what is expressed as an uniform rule for liquidation should be invaded by the varying exceptions which would result from the respondent's argument without express authority by the Legislature. All regulations about the ranking of creditors in liquidation necessarily affect existing rights, and some one or other of the competitors loses thereby. Accordingly, if in an enactment of this kind it were intended to exclude from its application persons in the position of the respondents, some specific enactment would be made. The circumstance that the change in the law is brought about in the form of an alteration in a Code which is supposed to express the existing and living law in its entirety does not, it is true, affect the principle applicable, but it vividly illustrates the need of some express exception, where it is intended to protect in the future one class of rights from the mass affected by general words. Their Lordships do not think that the presumption against retroaction compels the conclusion that it is to be pursued through all the consequences of the main enactment, and they deem its true application in the present instance to be merely to limit art. 2005 to abandonments occurring after it came in force.

Their Lordships will, therefore, humbly advise His Majesty that the appeal ought to be allowed, the judgment of the Court of King's Bench reversed with costs, and the judgment of Archibald J. restored. The respondents will pay the costs of this appeal.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondents: *Simpson, Rushforth & Co.*

[PRIVY COUNCIL.]

J. C.* 1905 July 25, 26. Aug. 4.

CENTRAL ONTARIO RAILWAY . . . DEFENDANTS;

AND

TRUSTS AND GUARANTEE COMPANY, LIMITED . . . . . PLAINTIFFS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Law of Ontario—Sale of Railway by Mortgagee—Order of Court—Dominion Act 46 *Vict. c.* 24, *ss.* 14–16 — *Dominion Railway Act*, 1888 (51 *Vict. c.* 29).

Held, that a railway incorporated in 1873 by an Ontario statute, and declared by a Dominion statute in 1884 to be a work for the general advantage of Canada (thereupon becoming subject to the legislation of the Dominion), can in a suit by the trustees for bondholders to enforce a mortgage thereon be sold by virtue of the provisions contained in Dominion Act 46 Vict. c. 24, ss. 14, 15, and 16, re-enacted by the Dominion Railway Act, 1888 (51 Vict. c. 29).

APPEAL from a decree of the above Court (June 29, 1904) affirming a decree of the High Court of Ontario (April 6, 1903).

The sole point in question was the validity of the following provision in the decree: "This Court doth declare that the plaintiffs are entitled to have the defendants' railway and undertaking in the pleadings mentioned sold under the mortgage in question herein and doth adjudge the same accordingly." The circumstances under which the said decree was made are stated in the judgment of their Lordships.

Aylesworth, K.C., for the appellants, contended that it was the settled rule of law in Ontario that for reasons of public policy the Courts will not decree the sale or foreclosure of a railway undertaking; and that the Dominion statute 46 Vict. c. 24 has not altered this rule. Ontario statute 45 Vict. c. 61 made provision for the extension of the railroad in question and for the creation of a bond issue. It gave the railway the option of increasing the existing bond issue or

* *Present:* LORD MACNAGHTEN, LORD DAVEY, and SIR ARTHUR WILSON.

of superseding it under specified conditions by a new issue, in accordance with s. 9, sub-s. 11, of the General Railway Act of Ontario (Revised Statutes of Ontario, 1877, c. 165). The railway adopted the latter alternative, and the mortgage in question was executed and the bonds issued. It was a mortgage of the whole undertaking as a going concern, the description of the property mortgaged being very comprehensive, sufficient to include, not only the corporeal property of the railway, but also its franchises, rights, and powers. The rule of law that the property and undertaking of a railway company in operation as a going concern could not be sold either as a whole or piecemeal by the Court was as firmly established in Ontario as in England: see *Gardner* v. *London, Chatham and Dover Ry. Co.* (1) Dominion statute 46 Vict. c. 24, ss. 14, 15, and 16, were referred to, and it was contended that full effect could be given thereto by reading them as applying only to cases in which, by reason of special legislation or the jurisdiction of some particular province, the right to sell a railway undertaking was already recognised. At the time it was passed there was an important part of the Dominion, namely, the province of Quebec, where the law interposed no obstacle to the sale of a railway. A large number of Dominion statutes also authorized the bonding of railway undertakings and conferred powers of sale on default. Reference was also made to *Redfield* v. *Wickham* (2), and it was contended that that case only affirmed for the province of Quebec the rule of law which its Courts had laid down, and had no application to the province of Ontario or the law there in force. The subject was discussed in argument in *Grey* v. *Manitoba and North Western Ry. Co.* (3) Reference was also made to *Stephen* v. *La Banque d'Hochelaga.* (4)

Blackstock, K.C., and *F. Russell* (*German, K.C.*, with them) contended that the Court had jurisdiction to order a sale in this case. The broad principle is that every mortgagee is entitled in the absence of special circumstances to enforce his

(1) (1866) L. R. 2 Ch. 201.
(2) (1888) 13 App. Cas. 467.
(3) [1897] A. C. 254.
(4) (1886) Montreal L. R. 2 Q. B. 491.

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security by sale of the mortgaged property, and if necessary to obtain an order of Court for that purpose. No such special circumstances could be claimed to exist in the present case. If they ever did exist, they have been removed by force of 46 Vict. (Canada) c. 24, and 51 Vict. (Canada) c. 29. The latter Act re-enacted the former, and provided, not merely for the sale of a railway, but that the purchaser might work the railway for a limited time until he obtained from Parliament authority so to do, and that in default the railway should be closed or otherwise dealt with as determined by the Railway Committee. They relied on *Redfield* v. *Wickham*. (1)

Aylesworth, K.C., replied.

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Aug. 4.

The judgment of their Lordships was delivered by

LORD DAVEY. The only question to be decided on this appeal is whether a railway which is subject to the legislation of the Dominion can be sold in a suit by the trustees for bondholders to enforce a mortgage on the railway company's railway, lands, and franchises. All the learned judges who have taken part in the decision in the Courts below have decided that it can, and the appeal is by the railway company against their decision.

The appellant company was incorporated in the year 1873 by a statute of the Legislature of Ontario under the name of "The Prince Edward County Railway." By a subsequent statute of the same Legislature the name of the company was changed to that of "The Central Ontario Railway," and it was empowered to borrow such sums as might be expedient for completing, maintaining, and working the railway, and to hypothecate, mortgage, or pledge the lands, tolls, revenues, and other property of the company for the due payment of the said sums and the interest thereon.

In pursuance of this power the appellant company made an issue of $2,200,000 in 2200 bonds of $1000 each bearing interest at 6 per cent. per annum. And to secure such issue the company executed an indenture of mortgage dated April 1, 1882, to the Toronto General Trusts Corporation (the original

(1) 13 App. Cas. 467.

plaintiffs in the action) as trustees for the bondholders, whereby the company granted to the mortgagees (inter alia) the company's railway and the lands occupied thereby, and all corporate and other franchises held or exercised by the company, and the tolls, rents, issues, and profits thereof. And it was provided that in case default should be made in payment of the principal of the bonds, the trustees, at the request of 75 per cent. of the bondholders, should immediately elect and declare the principal of all the bonds to be due and payable, and should take proceedings to enforce payment of the principal as speedily as possible instead of operating the railway and conducting the business thereof as previously provided for in case of default being made in payment of interest.

By a Dominion statute passed in the year 1884 (47 Vict. c. 60) the Central Ontario Railway was declared to be a work for the general advantage of Canada, and thereupon became subject to the legislative authority of the Parliament of Canada.

By a previous Act of the Parliament of Canada (46 Vict. c. 24) it was in ss. 14, 15, and 16 enacted as follows:—

"14. If at any time any railway or any section of any railway be sold under the provisions of any deed of mortgage thereof, or at the instance of the holders of any mortgage bonds or debentures, for the payment of which any charge has been created thereon, or under any other lawful proceeding, and be purchased by any person or corporation not having any corporate powers authorizing the holding and operating thereof by such purchaser, the purchaser thereof shall transmit to the Minister of Railways and Canals, within ten days from the date of such purchase, a notice in writing stating the fact that such purchase has been made, describing the termini and line of route of the railway purchased and specifying the charter under which the same had been constructed and operated, including a copy of any writing preliminary to a conveyance of such railway which has been made as evidence of such sale; and immediately upon the execution of any deed of conveyance of such railway the purchaser shall also transmit to the Minister of Railways and Canals a duplicate or an

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authenticated copy of such deed, and shall furnish to the Minister, on request, any further details or information that he may require.

"15. Until the purchaser shall have given notice to the Minister in manner and form as provided by the last preceding section, it shall not be lawful for the purchaser to run or operate the railway so purchased, or to take, exact or receive any tolls whatever in respect of any traffic carried thereon; but after the said conditions have been complied with, the purchaser may continue until the end of the then next session of the Parliament of Canada to operate such railway and to take and receive such tolls thereon as the railway company previously owning and operating the same was authorized to take, and shall be subject, in so far as they can be made applicable, to the terms and conditions of the charter of the said company, until he shall have received a letter of licence from the Minister of Railways and Canals,—which letter the Minister is hereby authorized to grant, defining the terms and conditions on which such railway shall be run by such purchaser during the said period.

"16. It shall be the duty of such purchaser to apply to the Parliament of Canada at the next following session thereof after the purchase of such railway, for an Act of incorporation or other legislative authority, to hold, operate and run such railway, and if such application be made to the said Parliament and be unsuccessful, it shall be in the discretion of the Minister of Railways and Canals to extend the licence to run such railway until the end of the then next following session of Parliament and no longer; and if during such extended period the purchaser does not obtain such Act of incorporation or other legislative authority, such railway shall be closed or otherwise dealt with by the Minister of Railways and Canals, as shall be determined by the Railway Committee of the Privy Council."

These sections have been re-enacted in the Dominion Railway Act of 1888 (51 Vict. c. 29), and it is not disputed that they are applicable to the railway of the appellant company.

This action was commenced on April 24, 1902, in the High

Court for Ontario by the Toronto General Trusts Corporation on behalf of themselves, and also on behalf of the bondholders against the appellant company, to enforce the security created by the indenture of mortgage of April 1, 1882, and by the statement of claim the plaintiffs claimed (amongst other things) that, in accordance with the provisions of the mortgage, the railway and property thereinbefore described might be sold at the direction of the Court. It was formally admitted in the course of the proceedings that the principal and interest on the bonds were unpaid and in arrear at the date of the commencement of the action. But the defendants by their amended defence submitted that there was no jurisdiction in the Court to decree a sale of the defendants' railway and undertaking to answer the mortgage in question. The Toronto Trusts Corporation ceased to be trustees of the mortgage during the pendency of the suit, and the Trusts and Guarantee Company, Limited, were substituted for them, and are the present respondents.

In the well-known case of *Gardner* v. *London, Chatham and Dover Ry. Co.* (1) it was held by the Court of Appeal in England that the holder of a mortgage debenture granted by a railway company in the form given in the schedule to the Companies Clauses Consolidation Act of 1845 was entitled only to a receiver of the profits or fruits of the undertaking, and was not entitled to have the railway or the lands or any part of the capital property of the company sold for the payment of his debt. It will be remembered that the security given by such a mortgage bond is on the undertaking and (in certain cases) all future calls on shareholders and on all the tolls and sums of money arising by virtue of the company's Act. The reason for so holding was thus stated by Lord Cairns (2): "When Parliament acting for the public interest authorizes the construction and maintenance of a railway both as a highway for the public and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes

(1) L. R. 2 Ch. 201.
(2) L. R. 2 Ch. 212.

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them upon the company which Parliament has before it, and upon no other body of persons. These powers must be executed and these duties discharged by the company. They cannot be delegated or transferred."

It appears, however, from an early date to have been the practice in Canada to include the lands and other capital property of a railway company in a mortgage which the company was authorized to execute. And it was contended that where the Legislature authorized the railway and lands to be made the subject of security, it by implication authorized the exercise of the ordinary remedies of a mortgagee of lands. The contrary, however, was decided by the Courts of Upper Canada and Ontario in a case decided in the year 1862, and in subsequent cases which are quoted by the learned Chancellor and the judges of the Court of Appeal, and the reason given was the same as that stated by Lord Cairns, namely, that the vendee could not exercise the franchise by working and operating the railway. The Quebec Courts, on the other hand, took a different view under similar circumstances, and held that the railway might be sold as an entirety, but not broken up or sold piecemeal.

Their Lordships see no occasion to doubt the correctness of the law thus laid down by the Courts of Ontario, and it may be assumed to be still applicable to a railway company the powers of which are regulated exclusively by the law of the province. But as regards companies to which the Dominion legislation is applicable, a different complexion is put on the matter by the enactments which have been quoted. It is true that s. 14 does not of itself confer upon the Courts a power of sale of the railway, but it does provide a statutory means by which the railway may be operated under the licence and with the authority of the Minister of Railways in event of a sale being made at the instance of mortgagees. To quote language attributed to Lord Watson, "the Legislature has made provision for the transfer of the undertaking."

It can scarcely be doubted that the parties to the mortgage now under consideration contemplated and intended that the mortgagees should have and enjoy means for the recovery of

their principal money other than, and different from, the appointment of a receiver of the profits of the undertaking. The trustees are expressly directed to take proceedings to enforce payment of the principal as speedily as possible, instead of merely operating the railway for the benefit of the mortgagees as was provided in case of default being made in payment of interest. The proceedings referred to can only be such as may be taken in the ordinary course of law for recovery of money secured by mortgage including a judicial sale of the mortgaged property. It is true that at the date of the mortgage legal effect could not have been given by the Courts of Ontario to the intention of the parties thus expressed. But the railway having now become subject to the legislation of Canada, and that legislation having provided means by which the transfer of the undertaking may be effected without prejudice to public interests, the difficulty which prevented the Courts from giving to mortgagees of the railway and lands of a railway company the ordinary legal remedies of a mortgagee has now been removed, and the Court is now able to carry into effect the intention of the parties as expressed in the instrument of mortgage. Their Lordships adopt the language of the learned Chancellor in summing up the reasons for his judgment: "In brief, the Legislature permits a mortgage of the lands of the company. The right of such a mortgagee is to enforce his security by a sale of the land. There is now no countervailing right on the part of the public based upon the policy of the Legislature to prevent a sale being had, for upon and after the sale the road will still run its course and serve the public as and when in the hands of the original corporation."

The facts in the case of *Redfield* v. *Corporation of Wickham* (1) were somewhat different from those in the present case, but the views on the construction and effect of the statute expressed by Lord Watson in delivering the judgment of this Board coincide with those which their Lordships have endeavoured to express.

Their Lordships, therefore, agree with the judgment of the Court of Appeal and with the reasons for it given by the

(1) 13 App. Cas. 467.

J. C. 1905 CENTRAL ONTARIO RAILWAY v. TRUSTS AND GUARANTEE COMPANY.

learned judges, and will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the costs of it.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondents: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.* 1905 *June* 1; *July* 3.

SHORT AND OTHERS . . . . . DEFENDANTS;

AND

TURFFONTEIN ESTATES, LIMITED . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF THE TRANSVAAL.

Law of the Transvaal—Lease of Land for Agricultural Purposes—Covenant not to sell a Lease for Building Purposes—Breach—Forfeiture.

Where land was leased exclusively for agricultural purposes, with liberty to the lessee to erect the necessary buildings for residence, but not to subdivide in order to sell or lease stands for building purposes:—

Held, that the lessor was entitled to treat the lease as null and void and eject the assignees thereof on its being shewn that they had advertised the land for sale in acre plots, and had issued plans shewing a proposed sub-division into acre plots. The breach of condition was complete without actual transfer of the plots to purchasers.

APPEAL from an order of the Supreme Court of the Transvaal (Sept. 9, 1903) whereby it was declared that the respondent company was entitled to treat as null and void a lease of certain property near Johannesburg, so far as concerned forty-four morgen thereof, which had been ceded to the appellants Louis William Short and Frans Johannes Wepener, and it was ordered that the appellants should deliver up possession thereof to the respondent company.

The suit was for the cancellation of the lease in suit, which is sufficiently set out in their Lordships' judgment, or in the alternative for an interdict restraining the appellants from dealing with the land for other than agricultural purposes.

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, SIR HENRY DE VILLIERS, and SIR ARTHUR WILSON.

The Supreme Court considered that there had been a sub-division of the land in the sense contemplated by the fourth clause of the said lease, that the lots were not advertised for sale bonâ fide for agricultural purposes, but that the real intention was to create a township.

Seward Brice, K.C., and *Mackarness*, for the appellants, contended that there had been no breach of either of the stipulations contained in the fourth clause of the lease.

The proposed sales of one-acre lots were in fact never carried out. The lots were advertised to be sold for agricultural purposes, and not for the purposes of a township. The sub-lease proposed to be given to purchasers of the plots expressly provided that the plots were to be used solely for agricultural purposes. The sub-division on the plan of the land into plots of one acre each was inconsistent with their being used or being intended to be used as "stands" for building purposes. The term "stand" was said to be well known to the law and custom of the Transvaal as a plot of land intended for a building site, and imported an area far smaller than one acre. It is also clearly distinguished in common language and in statutory proclamations from a plot or lot.

The respondent company had suffered no damage by the sub-division of the land, and the cancellation of the lease under the circumstances was contrary to the law of the Transvaal and the equitable doctrines on the subject of forfeiture and penal stipulations prevailing in that law.

They referred to Act No. 15 of 1898, s. 91, sub-s. 6, and s. 93; *Rautenbach* v. *Gold Fields Deep* (1); *Roorda* v. *Cohn* (2); *Angehra* v. *Friedman* (3); the Transvaal Transfer Duty Proclamation of 1902, s. 29, sub-s. 3; the Deeds Proclamation, 1902, s. 20; *Thomas* v. *Kerr* (4); Voet on Pandects, bk. 19, tit. 2, s. 16; *Cape Town Council* v. *Linder* (5); Pothier on Penal Obligations, part 2, c. 5, art. 1; Story's Eq. Juris. ss. 1314, 1315; Pollock, Principles of Contract, p. 507 (7th ed.).

(1) (1897) 14 Cape L. J. 214.
(2) (1903) Transvaal High Court Cases, 279.
(3) (1903) Transvaal High Court Cases, 267.
(4) (1903) 13 Cape Times Rep. 526.
(5) (1889) 6 Sup. Ct. Rep. (Juta) 410.

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Cohen, K.C., and *G. Lawrence*, for the respondents, contended that the issues raised were of fact, and that there was ample evidence to support the findings of the Supreme Court thereon. It was shewn that the user of the land in fact intended by the appellants was not an user for agricultural purposes. The intention was clearly proved to sell on lease the land as stands for building purposes; and it was in part carried into effect by sub-divisions already made for that purpose. Accordingly the respondents were, on the true construction and effect of the lease, entitled to cancel it by reason of breaches intended and committed, and to resume possession of the land comprised therein.

Seward Brice, K.C., replied.

1905 *July* 3.

The judgment of their Lordships was delivered by

LORD DAVEY. By a notarial instrument dated December 27, 1893, and made between the respondent company of the one part, and one Pieter Dirk de Villiers by his attorney of the other part, the respondent company leased to de Villiers a certain portion of the Turffontein Farm, measuring seventy-four morgen, for the term of ninety-nine years from November 1, 1889, at the rentals therein mentioned, and it was thereby provided (clause 4) that the said piece of land was leased exclusively for agricultural purposes with the right to de Villiers to erect the necessary buildings for residence, but not to sub-divide in order to sell or lease such portion as stands for building purposes; (clause 8) that in the event of de Villiers neglecting to pay the rent within thirty days after the same should have become due, or if the piece of land should have been built upon, then within three months after the same should have become due, or in the event of the breach of any of the conditions, terms, or provisions, the said lease should be null and void, and the respondent company should have the right to resume possession of the said piece of land and to eject de Villiers without the latter being entitled to make any claim to any compensation of whatsoever description; and it was further provided that de Villiers might cede to third parties,

either partially or in its entirety, the said agreement for lease, but only for agricultural purposes.

A portion of the lands demised containing forty-four morgen became vested by cession in the appellants Short and Wepener. Applications were made both orally and by letter by the appellant Short to the respondent company for permission to lay out the forty-four morgen as a township and dispose of it on the same terms as had been granted in another case; but the directors of the respondent company declined to entertain the proposal. Subsequently the forty-four morgen were transferred to the appellant company, which was incorporated on April 20, 1903. The appellants Short and Wepener signed the trust deed of the appellant company as subscribers of large numbers of shares, and became directors of the company.

On May 20, 1903, the appellants published advertisements of a sale to take place on the following May 27 of the fourty-four morgen in eighty-five one-acre lots. Such advertisements were accompanied by a plan, in which the land was shewn as laid out and sub-divided into such eighty-five lots with streets intersecting the land and affording a direct access to each lot, and it was admitted at the trial that the streets and blocks were marked out on the land as represented on the plan. The land was called in the advertisements "Turffontein Gardens," and described as situated within a few minutes' drive from Market Square, Johannesburg, adjoining Turffontein township, and amongst other attractions it was said to have a 'bus service at present, and that it would soon have a tramway.

By the statement of claim in this action it was alleged that the cession by Short and Wepener to the appellant company of the forty-four morgen was itself a breach of the terms and conditions of the lease of December 27, 1893, and it was also alleged that the appellants had committed a breach by sub-dividing the land in order to sell or lease the same as stands for building purposes. The respondent company claimed (1.) a declaration that it was entitled to treat the lease of December 27, 1893, so far as regards the forty-four morgen, as null and void, and (2.) delivery of possession, and alternatively (3.) an interdict against the use of the land for other than agricultural

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purposes, or otherwise committing a breach of the terms and conditions of the lease.

The defence was in substance a denial of the alleged breaches. The contention of the appellants was and is that they did not by the issue of the advertisements threaten or intend to use the land for other than agricultural purposes, and had not sub-divided the land in order to sell or lease the same as stands for building purposes.

The action was tried before the Chief Justice of the Transvaal and Solomon and Smith JJ. By their judgment dated September 9, 1903 (from which this appeal is brought), a declaration was made in the terms of the first paragraph of the claim, and the appellants were ordered to deliver up possession of the forty-four morgen of land to the respondent company. The Chief Justice who delivered the judgment of the Court said: "It is clear to me, looking at the advertisements and at the other facts in the case, that the object of this sub-division was to lay out a township to be occupied, not by industrious peasants each cultivating his own patch, but by an ordinary suburban population such as inhabits the neighbouring townships, coming into work at Johannesburg by the 'bus and tram service referred to in the advertisement."

Their Lordships cannot differ from this finding of fact, and they think it immaterial that the appellants endeavoured to cloak their purpose by the language which they used or the terms they proposed to insert in the leases to be granted to the purchasers. If the real intention of the appellants was in truth such as described by the Chief Justice, the case is not altered because they chose to say the sub-division was exclusively for agricultural purposes. A point, however, was raised before their Lordships on the meaning of the word "stand," which is not mentioned in the judgment of the Chief Justice. The appellants say in their case that the term "stand" is well known to the law and custom of the Transvaal as a plot of land intended for a building site, and imports an area far smaller than one acre. No witness was called to say that a plot of one acre would not be properly described as a "stand," and, in fact, there is no evidence whatever upon the

subject. If it is a question of the custom of the Transvaal, it would have been more advantageously dealt with in the Colony. The word seems to their Lordships to be used for a plot for erection of a dwelling-house, and it is obvious that the size of the stand might differ whether the houses were intended as residences for miners and persons engaged in similar occupations or suburban residences for a town population.

It was also contended that this is a mere paper scheme which was not carried into execution, and the proper relief (if any) in the circumstances was interdict and not ejectment. If the breach relied on was the intended use of the land for other than agricultural purposes, or some other unfulfilled purpose, the proper and only remedy would be by interdict. But the breach relied on by the respondent company is the accomplished fact of the sub-division of the land into plots, with a view to its being offered for sale. The learned Chief Justice has pointed out that the sub-division contemplated by the lease was a sub-division preceding sale and not following it, and the contention that there could be no breach of the fourth clause until the land had not only been cut up, but had been actually transferred to a number of new purchasers, seemed to him, as it does to their Lordships, quite untenable. That being so, their Lordships are not convinced that the Court had any jurisdiction to grant interdict instead of ejectment without the respondent company's consent. In fact, the point is not referred to in the judgment.

Their Lordships, therefore, will humbly advise His Majesty that the appeal should be dismissed, and the appellants will pay the costs of it.

Solicitors for appellants: *Travers-Smith, Braithwaite & Co.*
Solicitors for respondents: *Hollams, Sons, Coward & Hawksley.*

[PRIVY COUNCIL.]

J. C.* 1905 July 4, 26.

BURLAND . . . . . DEFENDANT;

AND

EARLE AND OTHERS . . . . . PLAINTIFFS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Practice—Order on further Directions to pay Interest on Amount Decreed—Power of Court—Discretion overruled—Interest intentionally omitted from Final Decree.

Where a decree of the Court of Appeal affirmed by an Order in Council had ordered the repayment of moneys received by the appellant in excess of his salary as manager of a company, but was silent as to interest on the sums so overdrawn :—

Held, that the Court had power to order interest on further directions as a matter of discretion, but that as it appeared from the judgment of their Lordships that the Order in Council intentionally omitted a direction to that effect, the discretion of the Court below should be overruled. As no claim for interest was made at the commencement of the action, it should be charged only on the amount decreed from the date of the decree of the Court of Appeal.

APPEAL from a judgment of the Court of Appeal (Sept. 14, 1903) affirming a judgment of Meredith C.J. (July 17, 1902).

The question decided on this appeal is as to the liability of the appellant to account for interest upon a sum of money which he was ordered to repay to the defendant company under an order of Council in this action dated December 10, 1901.

Interest was not prayed for in the statement of claim in respect of this item or asked in the cases, or argued before the Courts below or in the Privy Council. The master declined to add it to the amount found due.

On further consideration the appellant was ordered to pay the interest claimed as well as the principal, Meredith C.J. holding that he had neither authority to retain the money with which he had been charged, nor reason to entertain the belief

* *Present:* LORD DAVEY, LORD JAMES OF HEREFORD, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

that he had authority to retain it; and on appeal the Court of Appeal affirmed this view.

R. C. Smith, K.C., for the appellant, contended that interest should not have been charged. The moneys ordered to be refunded were paid to him during many years by virtue of the resolution of the board of directors dated April 24, 1888, and there was reasonable ground for believing that the resolution authorized the payment. Accordingly, the appellant was not in respect of the said moneys a trustee. He received them as his own, and so dealt with them in good faith through what has been decided to be a common error. Interest was not claimed in the action, and was not given either by the Courts below or by the Privy Council, or by the master after the case was sent back. The direction to pay interest was intentionally omitted by the Courts which decided the case on the merits. The Court, therefore, had no power to order interest on further directions. If it had a discretion to do so, such discretion was exercised in contravention of the true effect of the operative decision of the case and ought to be overruled. Reference was made to *Johnson* v. *Rex* (1); *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (2)

Aylesworth, for the respondents, contended that the appellant was a trustee for the company of the moneys ordered to be refunded, and was therefore chargeable with interest. The various sums drawn by him in excess of his salary constituted in each instance a wrongful taking and conversion of the funds of the company. There resulted a debt for a liquidated amount. The judgments in the case decided that the money had been taken wrongfully. His power to take it arose from his position of authority in the company's affairs, and in consequence of his fiduciary position. A jury would have allowed interest: see the Judicature Act of Ontario (R. S. O. c. 51), ss. 113, 116. The words in s. 113, "in which it has been usual for a jury to allow it," are not in the Imperial Act (3 & 4 Vict. c. 42), s. 28, from which the section is taken. The decisions in Ontario shew that interest is in practice more frequently allowed in

(1) [1904] A. C. 817. (2) [1893] A. C. 429.

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Ontario than in England. Reference was made to *Rodger* v. *Comptoir d'Escompte de Paris* (1); *McCullough* v. *Clemow* (2); *M'Cullough* v. *Newlove*. (3)

R. C. Smith, K.C., replied.

1905 July 26.

The judgment of their Lordships was delivered by

LORD DAVEY. In this case the sole question is whether the appellant should be charged with any or what interest on a sum which has been found due from the appellant in respect of sums drawn by him for salary as president and manager of the British American Bank Note Company, in excess of the sum of $12,000 per annum, to which he was admittedly entitled. The liability to repay this amount was declared by the judgment of the Court of Appeal for Ontario dated November 13, 1900, which was, as regards this matter, affirmed by the King in Council on the report of this Board. But neither the judgment of the Court of Appeal for Ontario nor the Order in Council contained any direction for payment of interest on the sums overdrawn, nor was interest thereon asked for by the amended statement of claim in the action.

Their Lordships do not doubt the power of the Court on further directions to order payment of interest on a sum found due from a defendant, although the decree declaring the liability contains no direction for payment of interest or the statement of claim does not ask for it. In a case like the present one the plaintiffs are not entitled as of right to interest, and the liability for payment of interest is a matter for the discretion of the Court, and depends largely on the view which the Court may take as to the conduct of the defendant to be charged and the circumstances under which the liability for payment of the principal sum was incurred. In such a case the question of interest is much more conveniently dealt with at the time when the original liability is declared, and when the tribunal has all the evidence bearing on the question before it, and to postpone the question for consideration to a later date before (it may be) a tribunal differently constituted

(1) (1870) L. R. 3 P. C. 65, 465. (2) (1895) 26 Ont. Rep. 467.
(3) (1896) 27 Ont. Rep. 627.

practically involves a reconsideration of the evidence in the cause, and is at least fraught with some inconvenience. Their Lordships feel this strongly in the present case. They have before them, however, the judgment of this Board delivered on the former appeal. They are unable to agree with the learned judges in the Courts below that the construction of the resolution under which the appellant claimed to draw the addition to his salary in question was so free from difficulty as has been represented, or to assume that Burland must have known that he was not intended to have the benefit of the resolution. And they are satisfied that this Board did not intend to charge the appellant with fraudulent conduct in the matter, and that the decision of this Board affirming the disallowance was not based on any such ground. It is quite true that the appellant was in a fiduciary position towards the company, and their Lordships do not doubt that interest might be ordered to be paid by him, but it is always a question of circumstances whether, and how far, the jurisdiction to do so should be exercised. Their Lordships observe that in their former judgment this Board pointed out that the respondent Earle was a director of the company with two short intervals until the year 1890, and another respondent was the administratrix of another gentleman who was a director from 1887 until 1892, and a third respondent was himself a director from the year 1892 to the commencement of the action in December, 1897. These gentlemen must be credited with having done their duty to the company, and must have been aware of the construction which the appellant placed on the resolution of 1888 in his own favour. They must also be assumed to have had at least the means of making themselves acquainted with the items which made up the amount charged for salaries in the accounts which they submitted to the shareholders for their approval. Their Lordships also observe that it is stated that the appellant's construction of the resolution has been acted on for ten years or more, and the action was not commenced until a diminution took place in the very large dividends which had previously been paid by the company. Their Lordships are fully sensible of the obvious objection to

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their overruling the discretion of the Courts of the Colony on such a question as the present one, and if the case had now come before the Board for the first time they probably would not do so. But being satisfied that if this Board had been asked to allow the full interest claimed on the hearing of the previous appeal it would not have done so, they feel they ought to give effect to their opinion. It does not, however, follow that no interest should be allowed. The Chief Justice suggests that interest should at any rate be allowed from the commencement of the action, when demand for payment was made, but no notice was then given that interest would also be claimed, although interest on other claims was asked by the statement of claim. Their Lordships think that justice will be done by allowing interest from November 13, 1900, the date of the judgment of the Court of Appeal for Ontario, and that such interest should be at the rate of 5 per cent. per annum, being the rate prescribed by the Act of Canada (63 & 64 Vict. c. 29).

Their Lordships will, therefore, humbly advise His Majesty that the order of the Court of Appeal of Ontario of September 14, 1903, be discharged, and the order of the High Court of Ontario dated October 8, 1902, be varied as follows, namely, in paragraph 3 thereof by omitting the words "the sum of $22,540.87, being interest," and inserting instead thereof the words "interest at the rate of 5 per cent. per annum from the 13th November, 1900," and by adding at the end of the paragraph the words "such interest to be computed by the master in case the parties differ as to the same," and in paragraph 5 thereof by omitting the words and figures "$86,353.52," and inserting in lieu thereof the words and figures following—that is to say, "the said sum of $58,556.25, with such interest thereon as aforesaid," and that each party bear their own costs of the appeal to the Court of Appeal of Ontario. As the appellant has substantially succeeded in this appeal, the respondents will pay his costs of this appeal.

Solicitors for appellant: *Ingle, Holmes, Sons & Pott.*
Solicitors for respondents: *Harrison & Powell.*

[PRIVY COUNCIL.]

MELBOURNE AND METROPOLITAN BOARD OF WORKS . . . . . } PLAINTIFFS;

AND

METROPOLITAN GAS COMPANY . . DEFENDANTS.

J. C.* 1905 May 24; July 5.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Law of Victoria, Act No. 1491, *s.* 8—*Sewers Rate—Construction—Gas Mains liable to be rated as Unsewered Property.*

The local board of works being empowered by their Act No. 1491, s. 8, to levy a rate for local purposes including sewage and drainage, and for that purpose to adopt as the rateable net annual values of the properties liable to be rated the valuation in force at the time of making the rate in the municipalities within which the properties respectively are situate, distinguishing between sewered properties and unsewered properties, the former being defined as property which abutted in whole or in part on a street in which a sewer had been laid or as connected with any of the board's sewers:—

Held, that the gas mains of the respondents did not fall within the definition of sewered property, but that, as they had been comprised and separately valued in the valuation in force in the municipalities within which they were situated, they were liable to be rated as unsewered property.

APPEAL from a decree of the Full Court (Aug. 12, 1903) allowing an appeal from a decree of Williams J. (April 28, 1903).

The action was brought to recover 3422*l.* 8*s.* 6*d.* in respect of sewers rates made in respect of the three years commencing July 1, 1898, and alleged to be leviable under the provisions of the Melbourne and Metropolitan Board of Works Act, 1890 (No. 1197), and the Acts amending the same, upon certain lands, buildings, works, and gas mains of the respondent. But at the trial it was admitted that the only dispute between the parties was as to the gas mains, and that the above sum was alleged (with a trifling exception) to be payable in respect of gas mains alone.

The substantial question accordingly was whether upon the

* *Present:* LORD MACNAGHTEN, LORD DAVEY, SIR FORD NORTH, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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true construction of the said Acts, the material sections being set out in their Lordships' judgment, the value of the respondents' gas mains was to be taken into consideration in calculating the rate payable in respect of sewage by the respondents to the appellants. There was the further question, in case such value was to be taken into consideration, whether the gas mains were liable to be rated as sewered or unsewered properties.

Williams J. decreed in favour of the appellants, and declared that until payment the rates claimed were to be a charge upon the respondents' property in respect of which they were claimed. The Full Court reversed this decree, and directed judgment to be entered for the respondents.

Haldane, K.C., and *Ryde*, for the appellants, contended that under ss. 122 and 123 of Act No. 1197 all property, whether sewered or not, was liable to contribute to the rates made by them. It is contrary to the policy of these Acts that any property should be entirely exempt from contribution to these rates, merely on the ground that it is not benefited by the sewers, either at all or in an equal degree with other property. Although s. 2 of Act No. 1491 repealed those sections, there is nothing in the later Act to exempt property from rates merely because it is incapable of being sewered. Besides, if the gas mains are not actually sewered, they are essential parts of the undertaking of the respondent company inseparably connected with buildings which are sewered, and consequently are within the meaning of s. 8 of the later Act; otherwise they are rateable as unsewered property within that section. Reference was made to *Pimlico Tramway Co.* v. *Greenwich* (1); *Melbourne Tramway, &c., Co.* v. *Mayor, &c., of Fitzroy.* (2)

Asquith, K.C., Danckwerts, K.C., and *A. C. Nesbitt*, for the respondents, contended that the words in s. 8, sub-s. 1, of the later Act, "total net annual value of such properties as are sewered and of such properties as are not," mean that only those properties are to be rated for sewers which are either actually sewered or are capable of being so, or of deriving an advantage therefrom. Gas mains are not such properties, and are not

(1) (1873) L. R. 9 Q. B. 9. (2) [1901] A. C. 153, 167.

assessable within the meaning of the Acts. It is not the undertaking of the company which is rateable under the Act, but only its component parts, and its mains do not fall within the section. If they do they are only liable as unsewered property.

Haldane, K.C., replied.

July 6. The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The question in this case is whether the Melbourne and Metropolitan Board of Works is authorized to levy rates on the Metropolitan Gas Company in respect of gas mains comprised and separately valued in the valuations of the several municipalities within which they are respectively situate, and, if so, whether such gas mains are to be treated for rating purposes as sewered properties or as unsewered properties. The question turns on the Melbourne and Metropolitan Board of Works Act, 1890 (No. 1197), as amended by the Melbourne and Metropolitan Board of Works Act, 1897 (No. 1491).

The board of works was constituted and incorporated by the Act of 1890. It was given the management of the sewage and drainage as well as of the water supply of the metropolis as defined by the Act. All rates received by the board were to be paid into the metropolitan general fund. Subject to a charge for interest on liabilities of the board, any moneys standing to the credit of the general fund were to be applied in payment of the salaries of the officers and servants of the board, and of the expenses of carrying the Act into execution, and of carrying out any works under the authority of the Act, and in paying off the principal of moneys borrowed. By s. 122 the board was authorized to prepare an annual estimate of its requirements, and then to make a rate to be called the "metropolitan general rate," and to assess the same upon the several municipal districts within the metropolis, in sums bearing the same proportion to the total amount to be raised by such rate as the net annual value of such property in each municipal district bore to the total net annual value of such property in the whole metropolis, but no rate was to exceed 1*s.* in the pound. By s. 123 it was declared that for the purpose

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of making any assessment under the Act the board should adopt as the net annual value of the property within each municipal district the total amount appearing by the valuation or assessment then in force in the municipal district for the purpose of striking municipal rates.

By the Act of 1897 the Act of 1890 was amended. Sects. 122 and 123 were repealed. By s. 5, sub-ss. 1 and 3, of the Act of 1897, it was enacted that the board should from time to time, after sewers had been laid in any street or part of a street, cause a general notice to be given that the board had made provision for carrying off the sewage of each and every property which, or any part of which, abutted on such street or part of a street in which sewers had been so laid, and that after such time as should be fixed by the board each and every property which, or any part of which, abutted on such street or part of a street should be deemed and taken to be a sewered property within the meaning of the Act, and that every property whether or not abutting as aforesaid which should be connected with any sewer of the board should be and should be deemed to be a sewered property.

Sect. 8 of the Act of 1897 contains the following sub-section :—

"(5.) For the purpose of making any rate the board shall adopt as the net annual values of properties the valuation in force at the time of making the rate in the municipalities within which the properties respectively are situate."

By sub-s. 6, s. 8, the board was authorized to levy upon every sewered property a rate to be called the "metropolitan general rate" for nine years after the commencement of the Act at 1*s.* in the pound of the net annual value of such property, and thereafter a rate not exceeding that amount. On unsewered property the rate for the nine years was to be 2*d.* or 1*d.* in the pound, according to the situation of the property as defined in the schedule to the Act. After the expiration of the nine years no rate was to be levied on unsewered property. By sub-s. 7 the rate to be made and levied on sewered properties was to be calculated as for all the purposes to which the metropolitan general fund was applicable.

In order to provide for certain contingencies, as, for instance,

in order to meet obligations incurred before the passing of the Act, the board was empowered (s. 10), but not oftener than once a year, to levy a rate up to the full amount of 1*s.* in the pound "on all properties within the metropolis whether sewered or not."

It appears that the gas mains of the Metropolitan Gas Company are and have been from time to time comprised and separately valued in the valuations in force in the municipalities within which they are situate.

The claim of the board is to enforce rates levied on the gas company in respect of their gas mains within the metropolis, treating them as sewered properties wherever they issue from and are connected with a property of the company coming under the definition of "sewered property" in the Act of 1897. On behalf of the gas company it is contended that their mains are not liable to the metropolitan general rate, and that if they are they are not liable to be rated as sewered properties. In the Court of first instance the learned judge, Williams J., gave judgment for the board on the ground that, the gas mains being necessarily connected with the gas works or gas holders of the gas company and forming part of its general system or undertaking, were through the gas works or gas holders connected with sewers of the board, and, therefore, were to be deemed sewered property. On appeal, the Full Court dismissed the action, holding that, inasmuch as gas mains are not capable of being sewered, they do not come within the description of property on which the board was by the Act of 1897 authorized to levy rates, and that, therefore, these gas mains were not liable to be rated at all.

Their Lordships are unable to agree in the view of Williams J. It appears to them that in the case of the gas company the subject liable to be rated is not the undertaking of the company, but the properties of the company comprised in the municipal valuations which the metropolitan board is bound to adopt, and that those properties, though comprised in the municipal valuations, are not liable to be rated as sewered properties unless they fall within the definition of sewered property in the Act of 1897.

J. C. 1905

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They agree in the opinion of the Full Court that the gas mains are not sewered properties, inasmuch as they do not abut on a street or part of a street in which sewers have been laid. But, on the other hand, as gas mains are not sewered property, their Lordships think they must come under the head of unsewered property, and that the circumstance that they are not in their nature capable of deriving from sewers the same benefit as houses intended for habitation is not of itself a sufficient reason for placing them in a new category not recognised by the Act, and so relieving them from rates altogether.

Their Lordships will, therefore, humbly advise His Majesty that the order of the Full Court dated August 12, 1903, and the order of the Supreme Court dated April 28, 1903, ought to be discharged, each party bearing his own costs in each of the said Courts, and that instead of the last-named order it ought to be declared that the gas mains of the respondent company comprised in the valuations of the municipalities within which they are respectively situate are liable to be rated as unsewered property, and that until payment such rates are a charge upon the property of the respondent company, and that (if necessary) it ought to be referred to the chief clerk of the said Supreme Court to inquire as to the amount of rates which under the foregoing declaration were chargeable on the said gas mains of the respondent company at the respective times of making the rates referred to in the statement of claim.

Their Lordships think there ought to be no costs of the appeal.

Solicitors for appellants: *Blyth, Dutton, Hartley & Blyth.*
Solicitors for respondents: *Wadeson & Malleson.*

[PRIVY COUNCIL.]

E. W. GILLETT & CO., LIMITED . . PLAINTIFFS; J. C.* 1905

AND

LUMSDEN . . . . . DEFENDANT. *July* 28.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Law of Ontario—Revised Statutes of Ontario, 1897, *c.* 48, *s.* 1—*Admission of Appeal—Order of Court—Appealable Case.*

Under the Revised Statutes of Ontario, 1897, c. 48, s. 1, it is essential that an appeal to the King in Council should be admitted by the Court of Appeal. The Court is bound to exercise its judgment whether any particular case is appealable or not; and where it appears by its order that it has left that question open, the appeal is incompetent.

APPEAL from a decree of the Court of Appeal (Dec. 29, 1904) affirming a decree of the Divisional Court (June 5, 1903) reversing a judgment of the trial judge, Street J. (July 9, 1902).

The action was for an injunction to restrain the respondent from infringing certain trade-marks, and the appellants alleged an exclusive right to use the word "cream" in connection with the manufacture and sale of yeast, and for damages. The First Court awarded an injunction without damages. The final decree dismissed the action.

Upon the application to the Court of Appeal for the allowance of the security upon the appeal, the respondent objected that the appeal was not competent, and Osler J., who, sitting in the Court of Appeal, allowed the security, in his order to that effect of October 17, 1904, directed "that this order shall not prejudice the right of the respondent to object to the competence of the said appeal."

Shipley, K.C., for the respondent, contended that the appeal was not competent. By the provincial statute, Revised Statutes of Ontario, c. 48, s. 1, it is provided that no appeal shall lie to the King in Council unless the matter in controversy

* *Present:* LORD MACNAGHTEN, LORD DAVEY, and SIR ARTHUR WILSON.

J. C. 1905 E. W. GILLETT & Co., LIMITED v. LUMSDEN.

exceeds the sum or value of $4000. In this action no sum or value is in controversy.

Fletcher Moulton, *K.C.*, and *Laidlaw*, *K.C.*, for the appellants, argued that on the sections of the Act the appeal did lie, and that the objection should be taken at the earliest moment, and came too late when the appeal was ripe for hearing.

[LORD DAVEY referred to Safford and Wheeler's Privy Council Practice, p. 173.]

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. Their Lordships are of opinion that this appeal is incompetent. On considering the "Act respecting Appeals to Her Majesty in Her Privy Council" (Revised Statutes of Ontario, 1897, c. 48), it seems clear to their Lordships that an allowance of the appeal is contemplated, and such an allowance must be one by the Court of Ontario. Having regard to the consequences that would follow from admitting an appeal, their Lordships think it is essential that the appeal should be admitted by the Court, and that the Court is bound to exercise its judgment in considering whether any particular case is appealable or not.

In the case before their Lordships the Court of Appeal has carefully avoided expressing any opinion. If indeed the appeal had come forward by the direction of the Court, and it might fairly be inferred that they had considered the question whether it was of appealable value or not, it might be open, and probably would be open, to their Lordships to hear the appeal. But in this particular case it appears from the second paragraph of the order of the Court of Appeal of October 17, 1904, that the Court left open the question whether the appeal was competent or not, and in their Lordships' opinion the appeal is not competent. They will, therefore, humbly advise His Majesty that the appeal be dismissed and the appellants must pay the costs.

Solicitors for appellants: *Harrison & Powell.*
Solicitors for respondent: *Blake & Redden.*

APPENDIX.

[JUDGMENTS IN THE COURT OF SESSION.] (1)

GRIMOND (OR MACINTYRE) AND OTHERS APPELLANTS; 1903 Oct. 31.

AND

GRIMOND AND OTHERS . . . . . RESPONDENTS. 1904 Jan. 15.

OPINION OF LORD LOW.—OCTOBER 31, 1903.

LORD LOW. The deceased Alexander Dick Grimond directed his testamentary trustees (to whom he conveyed his whole means and estate) to "divide, pay, and convey" one third of the residue of his estate "to and among such charitable or religious institutions and societies" as he might direct, and in such proportions to each or any as he might fix, by any writing, whether holograph or tested or under his hand, and failing thereof, to and among "such charitable or religious institutions and societies" as his trustees might select, and in such proportions to each or any as they might fix.

Mr. Grimond left no writing in regard to the institutions and societies which he desired to benefit, and the question raised in this case is whether the direction to his trustees to apply the fund to such charitable or religious institutions and societies as they might select constitutes a valid testamentary direction to which effect can be given.

It is not disputed that the words "charitable or religious institutions and societies" must be read disjunctively, and that it would be in the power of the trustees to apply the fund wholly to religious institutions and societies, and the question is whether that is not a description of the object of the bequest which is too vague and general to be the subject of a valid bequest.

It is necessary to determine in the first place whether a bequest to religious institutions and societies is a bequest for charitable purposes, because if it is so, it is admitted that it would be effectual. Apparently in England such a bequest would be regarded as falling within the category of "charitable," but I do not think that the English decisions as to what constitutes a charitable bequest can be safely appealed to, because the Courts of that country have, following the analogy of certain old statutes, given a much wider and more artificial significance to the word charity than has ever been adopted in Scotland. In the latter country, although I do not think that the term "charitable bequest" would now be limited to a bequest of an

(1) For report of the case in the House of Lords, see ante, p. 124.

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Lord Low.

eleemosynary nature, it seems to me that it cannot be extended so as to embrace a bequest only for religious purposes—especially where, as here, the truster has named religious purposes as being in contradistinction to charitable purposes.

If therefore the bequest is not a charitable bequest, the next question is whether—as the pursuers contend—it is too vague to receive effect.

That question appears to me to be one of great difficulty. There is no precise rule by which such a question can be solved, each case falling to be determined upon a reasonable construction of the language used. Perhaps the nearest approach to a rule of general application is that laid down by Lord Lyndhurst in the case of *Crichton* v. *Grierson*. (1) He there said that by the law of Scotland it was "competent for the disposer to point out particular classes of persons and objects which are intended to be the object of his favour, and then to leave it to an individual, or a body of individuals, after his death, to select out of those classes the particular individuals or the particular objects to whom the bounty of the testator shall be applied."

Now in this case the truster has pointed out a particular class of objects—religious institutions and societies—among which his trustees may make a selection. The pursuers, however, argued that although in one sense a class of objects was pointed out, the description was so wide and indefinite that it could not be made effectual, seeing that it embraced the whole world and every religion professed by mankind.

I agree that there is no local limit within which the trustees must exercise their discretion, but I cannot assent to the view that all religions are embraced. I think that it is extravagant to say that the trustees would be entitled to apply the fund to such an object as the endowment of a Mahomedan mosque or a Hindoo temple. It seems to me that, considering that the truster was a Scottish gentleman who is not said to have held any peculiar views upon matters of religion, the word "religious" cannot reasonably be read as including anything beyond (at all events) the Christian religion. I imagine that it is certain that the truster did not intend his trustees to go outside of the Christian religion, and it seems to me that in this country that is the natural meaning to attach to the word "religious" in the absence of any more precise definition. There is but little authority on the subject, but I observe that in *Attorney-General* v. *Pearson* (2) Lord Eldon L.C. said: "I take it that if land, or money, were given . . . for the purpose of building a church, or a house, or otherwise, for the maintaining and propagating the worship of God, and if there were nothing more precise in the case, this Court would execute such a trust by making it a provision for maintaining and propagating the Established religion of the country."

If then I am right in thinking that the word "religious" must be construed as referring to the Christian religion, I am not prepared to say that a direction to trustees to apply a fund to such institutions and societies of that religion as they might select is so indefinite as to be inextricable and incapable of being carried out.

As I have said, each case must be decided upon a consideration of its own

(1) (1828) 3 W. & S. 329. (2) (1817) 3 Mer. 353, at p. 409; 17 R. R. 104.

language and circumstances, but I think that the view which I have taken of the present case receives some support from the decision of the House of Lords in *Whicker* v. *Hume* (1), where a bequest of a scope somewhat similar to (but as I think wider than) that with which I am dealing was upheld.

In that case a fund was conveyed to trustees "to be applied by them, according to their discretion, for the advancement and propagation of education and learning in every part of the world."

In giving judgment in that case the Lord Chancellor (Chelmsford) said: "There is no difficulty whatever with regard to the extensive character of this gift, for the subject upon which the discretion of the trustees is to be exercised is specific and limited. It is for 'education' and for 'learning,' in the sense of teaching and instruction. . . . . The mere circumstance that this spacious area" (every part of the world) "is open to the discretion of the trustees would not prevent the gift being available as a good charitable bequest, the direction being sufficiently pointed and specific to be definite and certain."

Now it seems to me that "religious institutions and societies" (reading the word "religious" in the sense in which I think it must be read) form an object of bequest as specific and limited as "teaching and instruction," and, if that is so, then, according to Lord Chelmsford, the fact that no local limits are fixed within which the discretion of the trustees must be exercised is of no moment.

It was argued, however, that the case of *Whicker* (1) could not be regarded as an authority here, because the question was whether the bequest fell within the very wide category of what by the law of England are regarded as charitable purposes. That is true, but upon the other hand it is to be remembered that although the scope of purposes regarded as charitable is much wider in England than in Scotland, the English Courts have not adopted so liberal and benignant an interpretation of charitable bequests as has obtained in Scotland.

For these reasons I am of opinion that the defenders should be assoilzied.

OPINIONS OF THE JUDGES OF THE SECOND DIVISION.—
JANUARY 15, 1904.

THE LORD JUSTICE-CLERK. I am of opinion in this case that the decision at which the Lord Ordinary has arrived is right and ought to be adhered to. The only ground on which the bequest in question is impugned is the ground of "vagueness and uncertainty." The bequest is distinct enough in its terms as regards the words used. It is that his trustees shall divide the residue of the estate into three equal parts, and "with regard to one of the said parts or shares, they shall divide, pay, and convey the same to and among such charitable or religious institutions and societies as I may direct, and in such proportions to each or any as I may fix by any writing, whether holograph or tested or under my hand, and failing thereof in whole or in part, then as regards such whole or such part not disposed of by me to and among such

(1) (1858) 7 H. L. C. 124.

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The Lord Justice-Clerk.

charitable or religious institutions and societies as my trustees, or the survivors or survivor of them, may select, and in such proportions to each or any as they may fix." It is not maintained that any part of this bequest is open to the imputation of vagueness or uncertainty, except the words in which the object is described, namely, "charitable or religious institutions and societies." The testator left no directions, and therefore the selection is in the power and discretion of the trustees. But I do not think that it can be reasonably suggested that the testator himself could not have selected institutions or societies which would have been in accordance with the word "charitable" or the word "religious." Many objects might include both charitable and religious, and others might be more directly charitable as distinguished from religious and vice versa. It can only be by the exercise of honest discrimination by those entrusted with the fund that the desire of the testator can be made effectual; but the desire is clear enough, that either charitable organisations or religious organisations shall be benefited. He has left the selection to his trustees, presumably he having confidence in them, and relying upon their integrity, discretion, and judgment. The range of objects which he gives them is the range of the charitable or the religious, as embodied in existing institutions or societies. The choice is the trust they have to carry out—a trust of discretion, but a trust as regards which trustees cannot be in any real difficulty as to the class of objects which they are to have in view in making their selection of the bodies to which they will give grants. Charitable and religious are both expressions of limited range, and with limits which are quite intelligible to an ordinary mind. Both in England and Scotland the term charitable has not been held to be so general as to make a bequest bad from vagueness and uncertainty. Therefore if the words "or religious" had not been added the bequest could not have been impugned. Can it be said that the word "religious" is vague and uncertain if "charitable" is not? I am unable so to hold. In England a bequest to religious institutions has been held not to be void from uncertainty as being a charitable bequest. That, of course, does not directly bear upon the interpretation of a Scotch bequest for the reasons pointed out by the Lord Ordinary, but I think the decision is useful in illustrating that "religious" can be interpreted as being not a general but a restricted expression. For it is difficult to see how "religious" could be held to fall within "charitable" if it was an expression of so wide a range as not to be compressible within any category of definition at all. As to what may fall under the word "religious," I express no opinion as to the limits of the bequest such as is expressed by the Lord Ordinary. I feel myself unable to hold that the term "religious," as used in this bequest, is vague and uncertain so as to make the bequest void, and I would move your Lordships to adhere to the judgment under review.

LORD YOUNG. It is, I think, sufficient for me to say that I concur with the Lord Ordinary, not indeed in everything he has said in his Note, but in the result and import of his opinion as applicable to this case, and sufficient, in my opinion, for its decision. I cannot, for example, assent to the proposition that in the construction and application of a testamentary bequest this Court can regard no institution, society, or purpose as religious unless the religion

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thereof is the Christian religion. In their administration in execution of the bequest the trustees or executors may take account of the religion of the testator as being very, and possibly even conclusively, important. But no question regarding the validity of any actual or proposed administration is before us. Suppose the testator to have been a Jew or a Unitarian, or of any other religion than the Christian. It is unnecessary to pursue this topic, though I have thought it proper to state my dissent from the limitation expressed by the Lord Ordinary.

LORD TRAYNER. I think this bequest is valid. The truster directs his trustees to distribute a part of his estate among "such charitable *or* religious institutions and societies" as they may select, and in such proportions as they may think fit. If the trust deed had said "charitable and religious societies," there would have been no question that the bequest was valid. I think our decisions have settled that. But the use of the disjunctive "or" instead of the copulative "and" does, as the Lord Ordinary holds, give the trustees the power (although it by no means compels them) to exclude charitable institutions, and to confer the whole benefit of the bequest on "religious institutions and societies." I take it that the rule by which we must be guided in our decision of the present question is that laid down by the Lord Chancellor in the case of *Crichton* v. *Grierson* (1), quoted in the Lord Ordinary's opinion. Now, applying that rule here, I think the truster has distinctly specified the class of objects he intended to favour. "Religious institutions and societies" is a definition or description in no way less specific than "charitable institutions" or "benevolent institutions," and bequests to the last two named classes have been held good and valid. I am not to be held as concurring in the Lord Ordinary's view that the bequest is limited to institutions connected with the Christian religion. This bequest, it rather seems to me, leaves the trustees a discretion which is not limited to any locality or any creed.

LORD MONCREIFF. This case, which affects the disposal of a very large sum of money, involves an important legal question.

The words to be construed are—"Such charitable *or* religious institutions and societies as my trustees, or the survivors or survivor of them, may select." The settlement contains nothing to aid us in the interpretation of these words. Up to a certain point I agree with the Lord Ordinary. He holds that these words must be read disjunctively, and that it would be in the power of the trustees to apply the fund wholly to "religious purposes." He further holds (and rightly, in my opinion) that in this deed a "charitable" bequest cannot be read as embracing a bequest for "religious" purposes only.

He has therefore considered and decided the case as if the bequest were simply one "for religious purposes." He has decided that a bequest in these terms is not void from uncertainty on the ground that the word "religious" must be construed as confined to the Christian religion, and that the bequest so interpreted is sufficiently specific to be supported. Here I differ from him,

(1) 3 W. & S. 329.

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and so I understand do your Lordships. The trustees' power of selection is not limited to institutions and societies for the propagation of the Christian religion; indeed, in the course of the discussion counsel for the respondents admitted that under the power conferred upon them the trustees might if they chose endow religious bodies who did not profess the Christian faith, provided always that the tenets and practices of such societies were such as a Court of law in this country would recognise and enforce as lawful. Not to take an extreme illustration, I apprehend that it would be within the powers of the trustees to apply the fund for the maintenance of a Unitarian or a Theistic chapel or a Jewish synagogue. Such latitude of selection seems to me to exceed the limits of delegation to which the law will give effect. There is no limit either as to locality or creed.

Even if the Lord Ordinary were right in holding that the selection must be confined to societies professing the Christian religion, I should not be prepared to hold that such a bequest is sufficiently specific to admit of being enforced. The distinctions between different churches and denominations professing the Christian religion are sharply defined and strictly enforced. The deed gives us no clue to the truster's religious belief. He may have been a Presbyterian, yet under this power the trustees would be entitled to apply the bequest for the support of an Episcopal or Roman Catholic church. Again, he may have shared the views of the minority of the Free Church, and yet a Court of law could not prevent his trustees from applying the bequest to the Sustentation Fund of the United Free Church. In short there is not only no local limit, but no specific selection among a number of Christian churches and denominations, differing widely not only as to Church government and ritual, but as to the importance and authority of fundamental articles of faith.

The same difficulty does not arise with a bequest for "charitable purposes" in the ordinary sense of the term which can be applied in relief of poverty irrespective of church or creed.

It is said that the term "religious purposes" is more restricted and definite than "public purposes." This may be true, but it does not follow that the term "religious purposes" is sufficiently specific to be enforced. Indeed, there may be as much doubt and dispute as to its interpretation and limits as in regard to "public purposes."

But it was argued that a "religious purpose" is a "charitable purpose." This involves acceptance of the wide construction that has been put on a bequest for "charitable purposes" in England, which is traceable to the construction placed upon the expression "charitable purposes" in the statute of 43 Eliz. c. 4. These words have been held in England to cover "religious," "educational," and "public" objects, and numerous illustrations are to be found in the English decisions to this effect, which will be found conveniently collected in Lord Fraser's opinion in *Baird's Trustees* v. *Lord Advocate* (1), and in the Lord Chancellor's (Lord Halsbury) opinion in *Commissioners for Special Purposes for Income Tax* v. *Pemsel*. (2) It appears from these decisions that in England public purposes of general utility are held to be

(1) 15 R. 682, 685.

(2) [1891] A. C. 531, 544.

charitable uses within the sense of the Act of Elizabeth. But for the favour shewn to bequests for "charitable purposes," a power to trustees to select objects for such a bequest would probably be held void from uncertainty. But a charitable bequest never fails from uncertainty. The process by which in England it has been held that a trust for "religious purposes" must receive effect is thus concisely stated by Lindley L.J. in the case of *White* v. *White*. (1) "We come therefore to the conclusion, first, that the gift is for religious purposes; and secondly, that being for religious purposes, it must be treated as a gift for "charitable" purposes unless the contrary can be shewn. If once this conclusion is arrived at the rest is plain. A charitable bequest never fails from uncertainty."

I am not aware, however, of any decision in the Scottish Courts which sanctions so wide a construction in a private deed of a bequest for "charitable purposes." In the case of *Blair* v. *Duncan* (2) in this Court and the House of Lords it was decided that a bequest for "charitable *or* public purposes" was void from uncertainty, because (1.) it was held that the expressions were used disjunctively; (2.) therefore the trustees were empowered to apply the bequest solely to public purposes; (3.) all public purposes are not charitable purposes, although some of them may be (the same may be said of "religious purposes"); and (4.) a bequest for "public purposes" alone is too vague to receive effect. That was a decision in a Scottish case depending upon the construction of a Scottish settlement. If, therefore, I am right in holding that although perhaps not so wide as "public purposes," "religious purposes" equally with "public purposes" are not sufficiently specific to be enforced, the same result should follow in this case as in the case of *Blair* v. *Duncan*. (2)

I have not lost sight of the decision in the House of Lords in the English case of *Commissioners for Special Purposes for Income Tax* v. *Pemsel*. (3) It was not a decision in a Scottish case, although the law of Scotland was much discussed. It was a decision on an Imperial taxing statute, into the construction of which considerations entered which do not necessarily apply to the interpretation of a private deed. Lastly, there was great difference of opinion in the House of Lords, Lord Halsbury and Lord Bramwell dissenting strongly. The case was fully in view of the House of Lords in the recent case of *Blair* v. *Duncan*. (2) In regard to it the Lord Chancellor said: "I will only say that in my view the decision in that case is an authoritative determination, and in speaking of a taxing Act which applies to both countries, the decision of that case must of course be supreme. But speaking of a Scottish instrument, and the interpretation to be given to the word 'charitable' in Scotland, I should regard the decision of *Baird's Trustees* v. *Lord Advocate* (4) as still an authoritative exposition of the law of Scotland."

In conclusion, I would observe that our decision cannot be affected by the consideration that the trustees would have no difficulty in applying the bequest to religious purposes which would have met with the truster's approval. The same might be said of any direction, however vague and

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(1) [1893] 2 Ch. 41, 53.
(2) [1902] A. C. 37.
(3) [1891] A. C. 531.
(4) 15 R. 685.

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uncertain. The truster's own religious views, of which we are told nothing, do not seem to me to affect the question. He has left his trustees unlimited discretion, and the trustees, who have the ultimate disposal of the capital, are grandnephews who may have no special knowledge of the truster's private views or wishes, and who, if they knew them, are certainly not bound by them as he has left them unfettered.

On the whole matter, I am of opinion that the bequest is void from uncertainty.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 2, 1905, will be as follows :—

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[1905] 1 Ch. [1905] 2 Ch.

In the Second Series,
[1905] 1 K. B. [1905] 2 K. B. [1905] P.

In the Third Series,
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A stockbroker, being hopelessly insolvent, told his Stock Exchange creditors that he would have a difficulty in paying them at the approaching settlement and suggested that they should close their accounts with him, which they did :—

Held (by the Earl of Halsbury L.C. and Lord Robertson, Lord Macnaghten dissenting), that the stockbroker had no intention in fact to give his creditors notice that he was about to suspend payment of his debts, and that there was in fact no such notice given within the meaning of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (*h*).

BANKRUPTCY—*continued.*

Decision of the Court of Appeal, sub nom. *In re Reis, Ex parte Clough*, [1904] 2 K. B. 769, affirmed. CLOUGH *v.* SAMUEL - **H. L. (E.) 442**

BARRISTER—House of Lords—Peer's right to be heard at the bar—Practice - **468**
See HOUSE OF LORDS.

BECHUANALAND PROTECTORATE—Laws of
See PRIVY COUNCIL APPEALS. 2. **139**

BILL OF LADING—Exceptions—Warranty as to seaworthiness - - - **93**
See SHIPPING. 1.

BILL OF SALE — *Loan — Hire and Purchase Agreement—Inference of Fact—Registration.*

M., who had made a contract to buy a hotel and its furniture, being unable to find all the money, agreed with a wine merchant that he should provide 2000*l.* The wine merchant went to the vendor and paid him 2000*l.*, the vendor giving a receipt for that sum as the purchase-money of the furniture. The same day the wine merchant and M. signed a hire-purchase agreement by which the wine merchant let and M. hired the furniture for 2412*l.* to be paid by instalments, the furniture not to become the property of M. till all the instalments were paid. The purchase of the hotel was then completed and M. took possession. After paying some of the instalments M. became bankrupt:—

Held, that the circumstances shewed that as a matter of fact the sale to the wine merchant was only colourable, that the transaction between the wine merchant and M. was really a loan upon the security of the hire-purchase agreement, and that that agreement not having been registered under the Bills of Sale Acts was void as against M.'s creditors.

The decision of the Court of Appeal, *Mellor* v. *Maas*, [1903] 1 K. B. 226, affirmed. MAAS *v.* PEPPER - - - **H. L. (E.) 102**

BOMBAY—Laws of - - - - **213**
See PRIVY COUNCIL APPEALS. 13.

BOND—Insane person, Bond passed under power of attorney granted by—Law of Natal
See PRIVY COUNCIL APPEALS. 15. **555**

BOUNDARY—Harbour—"Precincts"—Removal of sand from foreshore - - **491**
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BREACH OF CONTRACT.
See under CONTRACT.

BREACH OF COVENANT.
See under COVENANT.

BREACH OF TRUST—Trustees not entitled to be excused—Erroneous advice of solicitor—Law of Victoria - - **373**
See PRIVY COUNCIL APPEALS. 27.

BRITISH NORTH AMERICA ACT—Powers of Dominion legislature — Local undertakings extended beyond provincial limits - - - - **52**
See PRIVY COUNCIL APPEALS. 3.

—— Readjustment of representation—"Aggregate population of Canada" - **37**
See PRIVY COUNCIL APPEALS. 3.

BROKER — Stockbroker — Stock Exchange — Act of bankruptcy—Notice to suspend payment - - - - **442**
See BANKRUPTCY.

BY-LAW — Ultra vires — Ice-cream vendor's licence—Lawful day—Edinburgh Corporation - - - - **21**
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CANADA—Laws of.
33, 37, 52, 72, 128, 570, 576, 590, 601
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CARRIAGE — Ship — Contract of carriage — Breach of contract—Measure of damages
See SHIPPING. 3. **515**

CASES:—
—— *Anglo-American Telegraph Co.* v. *Spurling*, (1879) 5 Q. B. D. 188.
Dissented from by H. L. (E.) SHEFFIELD CORPORATION *v.* BARCLAY
[1905] A. C. 392, 401

—— *Ardan Steamship Co.* v. *Andrew Weir & Co.*, (1904) 6 F. 294.
Reversed by H. L. (Sc.) **[1905] A. C. 501**

—— *Attorney-General* v. *Northumberland (Duke of)*, [1904] 1 K. B. 762.
Affirmed by H. L. (E.) sub nom. NORTHUMBERLAND (DUKE OF) *v.* ATTORNEY-GENERAL - **[1905] A. C. 406**

—— *Attorney-General* v. *Tomline*, (1880) 14 Ch. D. 58.
Followed by H. L. (Sc.) MUSSELBURGH REAL ESTATE CO. *v.* MUSSELBURGH (PROVOST, &c., OF) - **[1905] A. C. 491**

—— *Bain* v. *Assets Co.* - (1904) 6 F. 754, 692
Reversed by H. L. (Sc.) **[1905] A. C. 317**

—— *Belt* v. *Lawes* - (1884) 12 Q. B. D. 356
Overruled on one point by H. L. (E.) WATT *v.* WATT - **[1905] A. C. 115**

—— *Brandt's (William) Sons & Co.* v. *Dunlop Rubber Co.*, [1904] 1 K. B. 378.
Reversed by H. L. (E.) **[1905] A. C. 454**

—— *Cassaboglou* v. *Gibbs*, (1882) 9 Q. B. D. 220; (1883) 11 Q. B. D. 797.
Affirmed by H. L. (Sc.) SALVESEN & CO. *v.* NORDSTJERNAN **[1905] A. C. 302**

—— *Chapman* v. *Perkins* - [1904] 1 Ch. 431
Affirmed by H. L. (E.) **[1905] A. C. 106**

—— *City and South London Ry. Co.* v. *United Parishes of St. Mary Woolnoth and St. Mary Woolchurch Haw*, [1903] 2 K. B. 728.
Affirmed by H. L. (E.) **[1905] A. C. 1**

—— *Clydebank Engineering and Shipbuilding Co.* v. *Don Jose Ramos Yzquierdo y Castaneda*, (1903) 5 F. 1016; sequel to [1902] A. C. 524.
Affirmed by H. L. (Sc.) **[1905] A. C. 6**

—— *Collen* v. *Wright*, (1857) 7 E. & B. 301; 8 E. & B. 647.
Distinguished by H. L. (Sc.) SALVESEN & CO. *v.* NORDSTJERNAN **[1905] A. C. 302**

—— *Collins* v. *Collins*, (1884) 9 App. Cas. 205, 242.
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—— *Cooper and Allen, In re* (1876) 4 Ch. D. 802
Overruled on one point by H. L. (E.) DUKE OF NORTHUMBERLAND *v.* ATTORNEY-GENERAL - - [1905] **A. C. 406**

—— *Crook* v. *Morley* - - [1891] A. C. 316
Referred to by H. L. (E.) CLOUGH *v.* SAMUEL - - [1905] **A. C. 442, 446**

—— *Crosfield (Joseph) & Sons, Ld.* v. *Manchester Ship Canal Co.*, [1904] 2 Ch. 123.
Affirmed upon one point and reversed upon one point by H. L. (E.)
[1905] **A. C. 421**

—— *Doyle* v. *Blake*, (1804) 2 Sch. & Lef. 231; 9 R. R. 76.
Approved of by P. C. NATIONAL TRUSTEES COMPANY OF AUSTRALASIA *v.* GENERAL FINANCE COMPANY OF AUSTRALASIA - - - [1905] **A. C. 373**

—— *Dugdale* v. *Lovering*, (1875) L. R. 10 C. P. 196.
Considered by H. L. (E.) SHEFFIELD CORPORATION *v.* BARCLAY
[1905] **A. C. 392, 397, 399**

—— *Elderslie Steamship Co.* v. *Borthwick*, [1904] 1 K. B. 319.
Affirmed by H. L. (E.) [1905] **A. C. 93**

—— *Gibbs* v. *Messer* - - [1891] A. C. 248
Distinguished by P. C. ASSETS CO. *v.* MERE ROIHI - - [1905] **A. C. 176**

—— *Glamorgan Coal Co.* v. *South Wales Miners' Federation*, [1903] 2 K. B. 545.
Affirmed by H. L. (E.) sub nom. SOUTH WALES MINERS' FEDERATION
[1905] **A. C. 239**

—— *Griffin* v. *Houlder Line, Ld.*, [1904] 1 K. B. 510.
Reversed by H. L. (E.) sub nom. HOULDER LINE, LD. *v.* GRIFFIN
[1905] **A. C. 220**

—— *Grimond (or Macintyre)* v. *Grimond*, (1904) 6 F. 285.
Reversed by H. L. (Sc.) [1905] **A. C. 124**

—— *Hanbury, In re* - - [1904] 1 Ch. 415
Reversed by H. L. (E.) sub nom. COMISKEY *v.* BOWRING-HANBURY
[1905] **A. C. 84**

—— *Higgins* v. *Campbell & Harrison, Ld. Turvey* v. *Brintons, Ld.*, [1904] 1 K. B. 328.
Affirmed by H. L. (E.) sub nom. BRINTONS, LD. *v.* TURVEY
[1905] **A. C. 230**

—— *Howden* v. *Yorkshire Miners' Association*, [1903] 1 K. B. 308.
Affirmed by H. L. (E.) sub nom. YORKSHIRE MINERS' ASSOCIATION *v.* HOWDEN - - [1905] **A. C. 256**

—— *Humphrys* v. *Pratt*, (1831) 5 Bli. (N.S.) 154
Considered by H. L. (E.) SHEFFIELD CORPORATION *v.* BARCLAY
[1905] **A. C. 392, 399**

—— *Joseph Crosfield & Sons, Ld.* v. *Manchester Ship Canal Co.*, [1904] 2 Ch. 123.
Affirmed upon one point and reversed upon one point by H. L. (E.)
[1905] **A. C. 421**

CASES—*continued.*

—— *Lamb, In re* - - (1887) 4 Morr. 25
Referred to by H. L. (E.) CLOUGH *v.* SAMUEL - - [1905] **A. C. 442, 446**

—— *London and North Western Ry. Co.* v. *Evans*, [1893] 1 Ch. 16.
Referred to by H. L. (Sc.) MUSSELBURGH REAL ESTATE CO. *v.* MUSSELBURGH (PROVOST, &C., OF) [1905] **A. C. 491, 500**

—— *London and North Western Ry. Co.* v. *Westminster Corporation*, [1904] 1 Ch. 759.
Reversed upon the facts by H. L. (E.) sub nom. WESTMINSTER CORPORATION *v.* LONDON AND NORTH WESTERN RY. CO.
[1905] **A. C. 426**

—— *Lord Advocate* v. *Moray (Countess of)*, (1904) 6 F. 347.
Reversed by H. L. (Sc.)
[1905] **A. C. 531**

—— *Mackenzie* v. *Allardes* - (1902) 5 F. 191
Affirmed by H. L. (Sc.) [1905] **A. C. 285**

—— *Mackenzie* v. *Mackenzie*, [1895] A. C. 384, 416.
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—— *Mellor* v. *Mass* - - [1903] 1 K. B. 226
Affirmed by H. L. (E.) sub nom. MAAS *v.* PEPPER - - [1905] **A. C. 102**

—— *Metropolitan Ry. Co.* v. *Wright*, (1886) 11 App. Cas. 152.
Followed by P. C. COX *v.* ENGLISH, SCOTTISH, AND AUSTRALIAN BANK, LD.
[1905] **A. C. 168**

—— *Musselburgh Real Estate Co.* v. *Musselburgh (Provost, &c., of)*, (1903) 5 F. 387.
[1905] **A. C. 491**

—— *Nordstjernan* v. *Salvesen & Co.*, (1903) 40 S. L. R. 305.
Decision altered by H. L. (Sc.) sub nom. SALVESEN & CO. *v.* NORDSTJERNAN
[1905] **A. C. 302**

—— *Ogdens, Ld.* v. *Nelson* [1904] 2 K. B. 410
Affirmed by H. L. (E.) [1905] **A. C. 109**

—— *Ogdens, Ld.* v. *Telford* [1904] 2 K. B. 410
Affirmed by H. L. (E.) [1905] **A. C. 109**

—— *Ponamma* v. *Arumogam* - [1902] A. C. 56
See PONNAMMA *v.* ARUMOGAM
[1905] **A. C. 383**

—— *Reis, In re. Ex parte Clough*, [1904] 2 K. B. 769.
Affirmed by H. L. (E.) sub nom. CLOUGH *v.* SAMUEL - - [1905] **A. C. 442**

—— *Rossi* v. *Edinburgh Corporation*, (1903) 5 F. 480.
Reversed by H. L. (Sc.) [1905] **A. C. 21**

—— *Sheffield Corporation* v. *Barclay*, [1903] 2 K. B. 580.
Reversed by H. L. (E.) [1905] **A. C. 392**

—— *Simm* v. *Anglo-American Telegraph Co.*, (1879) 5 Q. B. D. 188.
Commented on by H. L. (E.). SHEFFIELD CORPORATION *v.* BARCLAY
[1905] **A. C. 392, 401**

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—— *Six Carpenters' Case* (1610) 8 Rep. 146 a
Referred to by H. L. (E.) WESTMINSTER CORPORATION *v.* LONDON AND NORTH WESTERN RY. Co. [1905] **A. C. 426, 440**

—— *Solicitor-General* v. *Law Reversionary Interest Society*, (1873) L. R. 8 Ex. 233.
Considered by H. L. (E.) DUKE OF NORTHUMBERLAND *v.* ATTORNEY-GENERAL - [1905] **A. C. 406, 410, 419, 420**

—— *Ströms Bruks Aktie Bolag* v. *John & Peter Hutchison*, (1904) 6 F. 486.
Reversed by H. L. (Sc.)
[1905] **A. C. 515**

—— *Truman* v. *London, Brighton and South Coast Ry. Co.*, (1885) 11 App. Cas. 45.
Referred to by H. L. (E.). WESTMINSTER CORPORATION *v.* LONDON AND NORTH WESTERN RY. Co. [1905] **A. C. 426, 427**

—— *Watson* v. *M'Ewan*. *Watson* v. *Jones*, (1904) S. L. R. 213.
Reversed by H. L. (Sc.)
[1905] **A. C. 480**

—— *Watt* v. *Assets Co.* - (1904) 6 F. 754, 692
Reversed by H. L. (Sc.)
[1905] **A. C. 317**

—— *Webster* v. *Sharp & Co.* [1904] 1 K. B. 218
Affirmed by consent upon terms by H. L. (E.) - - [1905] **A. C. 284**

—— *West Ham Union* v. *Holbeach Union*, [1904] 2 K. B. 121.
Affirmed by H. L. (E.) [1905] **A. C. 450**

—— *Whiteley* v. *Edwardes* - [1896] 2 Q. B. 48
Approved by H. L. (E.) BOLITHO & Co. *v.* GIDLEY - - [1905] **A. C. 98**

—— *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, [1904] 1 K. B. 387.
Reversed by H. L. (E.) [1905] **A. C. 454**

—— *Wolstenholme, In re* - (1885) 2 Morr. 216
Referred to by H. L. (E.) CLOUGH *v.* SAMUEL - - [1905] **A. C. 442, 446**

CATTLE—By-law—Ultra vires—Power to charge fees on cattle in municipal sale-yards only—Law of New South Wales - **161**
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CERTIFICATE — Mining rights — Forfeiture of block of mining claims—Certificate of preliminary registration—Law of Bechuanaland - - - - **139**
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CHARITY—"Charitable or religious institutions and societies"—Trust disposition and settlement—Uncertainty - **124, 603**
See WILL. 3.

CHARTERPARTY — Damages for detention — Obligation to have cargo ready—Custom of port - - - - **501**
See SHIPPING. 2.

CHURCH—Lands Clauses Acts—Severance and injuriously affecting land - - **1**
See LANDS CLAUSES ACTS.

COMPANY—*Discharge of Contributory on Composition—Reduction of Discharge after Twenty Years on Allegation of Concealment of Assets—Lapse of Time.*

Where a company is wound up and contributories are discharged from further liability on a composition and a period of twenty years supervenes, every intendment must be made in favour of what was done twenty years before as having been lawfully and properly done.

In 1882 the Assets Company under a private Act of Parliament took over the whole assets and rights of the City of Glasgow Bank, which had gone into liquidation in 1878.

In 1901 and 1902 the Assets Company brought actions against trustees and beneficiaries of two contributories who had in 1879 been discharged of their liabilities to the bank on compromises with the liquidator, asking for a reduction of the compromises on the ground that the contributories in negotiating with the liquidator concealed or failed to disclose a portion of their property:—

Held, reversing the decision of a majority of the Second Division of the Court of Session, (1904) 6 F. 754, 692, with the assistance of three judges of the First Division, that, having regard to the circumstances of the case coupled with the delay, no concealment or untrue statement of assets had been proved or could at this distance of time be assumed. WATT *v.* ASSETS COMPANY. BAIN *v.* ASSETS COMPANY - **H. L. (Sc.) 317**

2. —— *Forged Transfer of Stock—Innocent Presentment for Registration — Indemnity — Implied Contract to indemnify.*

A banker in good faith sent to a corporation a transfer of corporation stock which purported to be executed by T. and H., the two registered holders of the stock, with a request to the corporation to register the stock in the name of the banker. The corporation in good faith acted upon this request and granted a fresh certificate to the banker who transferred the stock to third parties, and they were registered as holders. Afterwards it was discovered that T. had forged H.'s signature, and H. recovered against the corporation judgment whereby they were compelled to buy equivalent stock and register it in H.'s name, and to pay him the missing dividends with interest:—

Held, that both parties having acted bonâ fide and without negligence the banker was bound to indemnify the corporation against the liability to H., upon an implied contract that the transfer was genuine.

The decision of the Court of Appeal, [1903] 2 K. B. 580, reversed, and the decision of Lord Alverstone C.J., [1903] 1 K. B. 1, restored. SHEFFIELD CORPORATION *v.* BARCLAY
H. L. (E.) 392

3. —— *Private Act—Statutory Agreement—Arbitration Clause — Compulsory Reference — Ouster of Jurisdiction—Manchester Ship Canal Acts*, 1885 (48 & 49 *Vict. c. clxxxviii.*), *s.* 88, *and* 1896 (59 & 60 *Vict. c. clxxxii.*).

The Manchester Ship Canal Act, 1885, s. 88, enacted that certain provisions for the protection of the corporation of Warrington and traders unless otherwise agreed on by the corporation and the Ship Canal Company should have effect, and by sub-s. 22 that any difference arising

COMPANY—*continued.*

between the company and the corporation as to the meaning of the section or anything to be done or not to be done thereunder should be determined by an engineer to be appointed (unless otherwise agreed on) by the Board of Trade, whose decision should be final and binding on both parties.

By s. 202, any question arising between the company and any person touching anything to be done or not to be done or any money to be paid under the provisions of the Act should be determined by arbitration in manner provided by the Railways Clauses Consolidation Act, 1845.

An action having been brought by the corporation and traders against the company to enforce the statutory obligations:—

Held, upon a preliminary objection as to competency, that as to the corporation the action must be dismissed, the jurisdiction of the Court being ousted by the special provisions, but that the traders were entitled to proceed with the action and have the merits of their case determined.

The decision of the Court of Appeal, [1904] 2 Ch. 123, affirmed upon the first point and reversed upon the second. Joseph Crosfield & Sons, Limited *v.* Manchester Ship Canal Company - - - - H. L. (E.) 421

—— Proxy, Shareholder only to be—Nomination of unqualified proxy—Disqualification removed before proxy is used - 213
See Privy Council Appeals. 13.

COMPENSATION—Lands Clauses Acts.
See under Lands Clauses Acts.

—— Workmen's compensation.
See under Employer and Workman.

CONDITION—Contract for fixed period—Express term—Implied condition - - 109
See Contract. 1.

"IN CONFIDENCE"—Absolute gift—Precatory trust - - - - - 84
See Will. 2.

CONQUEST—Marriage contract—Wife's acquirenda — Accumulations of income — Legitim - - - - 285
See Scottish Law. 2.

CONTRACT — *Fixed Period, Contract for — Express Term—Implied Condition—Construction of Contract—Damages.*

Tobacco merchants contracted with a retail dealer that—in consideration of his purchasing direct from them and agreeing to continue to buy, display and sell their goods and not to sign any agreement with any other firm which would prevent him from carrying out this contract—they would for the next four years distribute to such of their customers as purchased direct from them their entire net profits on goods sold in the United Kingdom, and also the sum of 200,000*l.* a year, to be distributed every three months in proportion to the purchases. Soon after the manufacturers sold their business, and went into voluntary liquidation:—

Held, that upon the true construction of this particular contract there was an express contract to pay to the retail dealer his due proportion of

CONTRACT—*continued.*

200,000*l.* a year for four years, and that he was entitled to damages for the breach of that contract, the merchants having put it out of their own power to carry on the business.

The decision of the Court of Appeal, [1904] 2 K. B. 410, affirmed. Ogdens, Limited *v.* Nelson. Ogdens, Limited *v.* Telford
H. L. (E.) 109

2. —— *Penalty or Liquidated Damages—Time Limit—Waiver.*

The Spanish Government contracted with the appellants for the building of four torpedo boats, delivery to be within periods varying from six and a half months to seven and three-quarter months from the date of the contracts. The contracts provided that "The penalty for later delivery shall be at the rate of 500*l.* per week for each vessel." The vessels having been delivered many months after the stipulated period and the price paid, the Spanish Government claimed from the appellants payment of 500*l.* for each week of late delivery:—

Held (affirming the decision of the Second Division of the Court of Session, (1903) 5 F. 1016; sequel to [1902] A. C. 524), (1) that the sum of 500*l.* a week was to be regarded as liquidated damages and not as a penalty, and that the Spanish Government were entitled to recover; (2) that payment in full of the price of the vessels without reservation was no waiver of the claim for damages for delay in delivery. Clydebank Engineering and Shipbuilding Company *v.* Don Jose Ramos Yzquierdo y Castaneda
H. L. (Sc.) 6

3. —— *Procuring Breach of Contract—Cause of Action—Interference with Legal Right—Malice—Justification.*

Procuring a breach of contract is an actionable wrong unless there be justification for interfering with the legal right.

Miners employed in collieries without giving notice to their employers and in breach of their contracts abstained from working on certain days upon the direction or order of a federation of the miners given by their executive council. The federation and council acted honestly without malice or ill-will towards the employers, and with the object only of keeping up the price of coal by which the wages were regulated:—

Held, that an action for damages lay by the employers against the federation and its officers, no justification for their action being shewn.

The decision of the Court of Appeal, [1903] 2 K. B. 545, affirmed. South Wales Miners' Federation *v.* Glamorgan Coal Company
H. L. (E.) 239

—— Forged transfer of stock—Innocent presentment for registration—Implied contract to indemnify - - - 392
See Company. 2.

—— Loan—Hire and purchase agreement—Inference of fact—Registration - 102
See Bill of Sale.

—— Lunatic—Contract by insane person is void, not voidable — Rights of negotiorum gestor—Law of Natal - - 555
See Privy Council Appeals. 15.

CONTRACT—*continued.*

—— Military service, Contract with the Colonial Government for—Payments by the Imperial Government — Payments under the contract - - - - 551
See NEW SOUTH WALES. 16.

—— Principal and agent — Custom House, Obligation of agent to pass through—Laws of New South Wales - 66
See PRIVY COUNCIL APPEALS. 18.

—— Ship — Carriage — Breach of contract—Measure of damages - - 515
See SHIPPING. 3.

CONTRIBUTORY—Discharge of contributory on composition — Reduction of discharge after twenty years on allegation of concealment of assets—Lapse of time
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CONVENIENCES—Sanitary authority—Power to provide sanitary conveniences — Bonâ fide use of statutory powers - 426
See LONDON.

COSTS—Divorce—Wife's costs - - 466
See SCOTTISH LAW. 2.

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COURT OF APPEAL — Jurisdiction—Order for new trial unless damages reduced 115
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COVENANT—Lease of land—Covenant to pay taxes—Usual covenant by lessee 33
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—— Not to sell a lease for building purposes—Breach—Forfeiture—Law of the Transvaal - - - - - 584
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CROWN — Lands surrendered to the Crown subject to subsisting contracts—Rights of Crown against trespasser—Law of New Zealand - - - 147
See PRIVY COUNCIL APPEALS. 21.

CUSTOM—Charterparty—Damages for detention — Obligation to have cargo ready — Custom of port - - - 501
See SHIPPING. 2.

CUSTOM HOUSE—Obligation of agent to pass through—Principal and agent—Laws of New South Wales - - - 66
See PRIVY COUNCIL APPEALS. 18.

DAMAGE AND DAMAGES—Contract—Penalty or liquidated damages — Time limit—Waiver - - - - 6
See CONTRACT. 2.

—— Contract for fixed period—Express term—Implied condition - - - 109
See CONTRACT. 1.

—— Explosion, Damage caused by—Verdict—Absence of exact proof of cause of injury — Order setting verdict aside reversed—Laws of Canada - 72
See PRIVY COUNCIL APPEALS. 5.

DAMAGE AND DAMAGES—*continued.*

—— Measure of damages—Untrue statements by agent—Ship - - - 302
See PRINCIPAL AND AGENT.

—— Ship—Charterparty—Damages for detention—Obligation to have cargo ready—Custom of port - - - 501
See SHIPPING. 2.

—— Ship — Contract of carriage—Breach of contract—Measure of damages - 515
See SHIPPING. 3.

—— Verdict for excessive damages—Jurisdiction of Court of Appeal—Order for new trial unless damages reduced - - 115
See PRACTICE.

DEBT—*Assignment of Debt—Equitable Assignment—Advance of Money to Vendor of Goods—Direction to pay Price to Lender—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

Merchants agreed with a bank by whom they were financed that goods sold by the merchants should be paid for by a remittance direct from the purchasers to the bank. Goods having been sold by the merchants, the bank forwarded to the purchasers notice in writing that the merchants had made over to the bank the right to receive the purchase-money and requested the purchasers to sign an undertaking to remit the purchase-money to the bank:—

Held, that there was evidence of an equitable assignment of the debt to the bank with notice to the purchasers, and that the bank could recover the debt from the purchasers.

The decision of the Court of Appeal, [1904] 1 K. B. 387, reversed, and the decision of Walton J. restored. WILLIAM BRANDT'S SONS & CO. *v.* DUNLOP RUBBER COMPANY
H. L. (E.) 454

DEFAMATION — Slander—Evidence—Privilege—Statements made in witness-box and in preparing proof - - - 480
See SLANDER.

DISCHARGE—Of contributory on composition—Reduction of discharge after twenty years on allegation of concealment of assets—Lapse of time - - 317
See COMPANY. 1.

DISCRETION — Workmen's compensation—Discretion of county court judge - 284
See EMPLOYER AND WORKMAN. 2.

DISEASE — Anthrax — Injury by accident — Workmen's compensation - - 230
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DISENTAILING DEED — Succession duty — Tenant for life—Remainder in tail—Alienation — Succession derived from alienee - - - - 406
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DISQUALIFICATION—Removed before proxy is used—Shareholder only to be proxy—Nomination of unqualified proxy 213
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DIVIDED PARISHES AND POOR LAW AMENDMENT—Illegitimate child - 450
See POOR LAW.

DIVORCE — *Ireland — Divorce — Decree Nisi under the English Divorce Acts — Doubt as to Operation in Ireland—Domicil.*

Where there are doubts as to the operation in Ireland of a decree under the English Divorce Acts for the dissolution of the marriage of a domiciled Irishman, the proper course is to apply for an Act of Parliament confirming the decree and removing doubts. MALONE'S DIVORCE (VALID ACTION) BILL - H. L. (D.) 314

—— Wife's costs - - - - 466
See SCOTTISH LAW. 2.

DOCK — Workmen's compensation — Seaman — Employment on a ship afloat in a dock —Undertaker - - - 220
See EMPLOYER AND WORKMAN. 3.

DOMICIL—Ireland—Divorce—Decree nisi under the English Divorce Acts—Doubt as to operation in Ireland - - 314
See DIVORCE.

DUTY—Public revenue.
See under REVENUE.

ECCLESIASTICAL LAW — Church — Lands Clauses Acts—Severance and injuriously affecting land—Site of a church - 1
See LANDS CLAUSES ACTS.

EDINBURGH.
See under SCOTTISH LAW.

EMPLOYER AND WORKMAN—*Compensation— "Injury by Accident"—Disease—Anthrax—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1.

While a workman was employed sorting wool in a factory a bacillus (according to the medical evidence or theory) passed from the wool to the eye of the workman and infected him with anthrax of which he died:—

Held, by the Earl of Halsbury L.C. and Lords Macnaghten and Lindley, Lord Robertson dissenting, that this was a case of "injury by accident" within the meaning of the Workmen's Compensation Act, 1897.

The decision of the Court of Appeal, *Higgins* v. *Campbell & Harrison, Ld.*, *Turvey* v. *Brintons, Ld.*, [1904] 1 K. B. 328, affirmed. BRINTONS, LIMITED *v.* TURVEY - - H. L. (E.) 230

2. —— *Compensation—Partial Incapacity for Work — Maximum Amount of Compensation — Discretion of County Court Judge—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., clauses* 1 (*b*), 2.

In awarding compensation under the Workmen's Compensation Act, 1897, Sched. I., clauses 1 (*b*), 2, to workmen partially incapacitated for work, a county court judge cannot lay down any general rule as to the amount of compensation which he will award. The judge must exercise his discretion with regard to the circumstances of the particular case.

The decision of the Court of Appeal, [1904] 1 K. B. 218, affirmed by consent upon terms. WEBSTER (PAUPER) *v.* SHARP & Co. H. L. (E.) 284

3. —— *Compensation—Seaman—Employment on a Ship afloat in a Dock — "Undertaker"— —Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *ss.* 1, 7—*Factory and Workshop Act*, 1901 (1 *Edw.* 7, *c.* 22), *s.* 104.

Seamen employed in performing their ordinary duties as seamen afloat on board ship are not entitled to compensation for injury under the Workmen's Compensation Act, 1897, although the ship is at the time in a dock and the dock is a factory. In such a case the shipowner is not an "undertaker" within the meaning of the Act.

So *held*, by the Earl of Halsbury L.C. and Lords Macnaghten and Lindley, Lord James dissenting.

The decision of the Court of Appeal, *Griffin* v. *Houlder Line, Ld.*, [1904] 1 K. B. 510, reversed. HOULDER LINE, LIMITED *v.* GRIFFIN H. L. (E.) 220

ENTAIL—Estate duty paid by a deceased heir of entail and not specifically charged on entailed estates - - - 531
See REVENUE. 1.

EQUITABLE ASSIGNMENT — Debt — Advance of money to vendor of goods—Directions to pay price to lender - - 454
See DEBT.

ESTATE DUTY—Paid by a deceased heir of entail and not specifically charged on entailed estates - - - 531
See REVENUE. 1.

EVIDENCE — Slander — Privilege — Statement made in witness-box and in preparing proof - - - - - 480
See SLANDER. 1.

EXAMINATION—Jurisdiction to dispense with examination of lunatic - - 343
See PRIVY COUNCIL APPEALS. 17.

EXECUTORY GIFT—Precatory trust—Absolute gift "in confidence" — Absolute gift subject to executory gift over - 84
See WILL. 2.

EXPLOSION — Damage caused by — Verdict— Absence of exact proof of cause of injury—Laws of Canada - - 72
See PRIVY COUNCIL APPEALS. 5.

EXPULSION—Jurisdiction of arbitration committee—Dispute between member and society - - - - 78
See FRIENDLY SOCIETY.

EXTRADITION—Arrest and remand of accused —Writs of habeas corpus—Jurisdiction —Procedure—Release - - 128
See PRIVY COUNCIL APPEALS. 4.

FACTORY AND WORKSHOP—Workmen's compensation—Seaman—Employment on a ship afloat in a dock—"Undertaker" *See* EMPLOYER AND WORKMAN. 3. 220

FINANCE ACT.
See under REVENUE.

FORESHORE—Removal of sand from—Harbour —Boundary—"Precincts" - 491
See HARBOUR.

FORFEITURE—Bechuanaland, Laws of—Mining rights—Forfeiture of block of mining claims—Certificate of preliminary registration - - - - 139
See PRIVY COUNCIL APPEALS. 2.

—— Covenant not to sell a lease for building purposes—Breach—Law of the Transvaal - - - - - 584
See PRIVY COUNCIL APPEALS. 1.

—— Words of futurity—Limitation to events after testator's death - - 106
See WILL. 1.

FORGERY—Forged transfer of stock—Innocent presentment for registration—Implied contract to indemnify - - 392
See COMPANY. 2.

FRAUD—Transfer of native lands—Fraud in procuring registration—Law of New Zealand - - - - 176
See PRIVY COUNCIL APPEALS. 20.

FRIENDLY SOCIETY—*Jurisdiction of Arbitration Committee—Dispute between Member and Society—Expulsion—Friendly Societies Act*, 1896 (59 & 60 *Vict. c.* 25), *s.* 68, *sub-s.* 1.

Sect. 68 of the Friendly Societies Act, 1896, which enacts that every dispute between a member of a friendly society and the society shall be decided in manner directed by the rules of the society, and that the decision so given shall be binding and conclusive on all parties without appeal, does not apply to a decision given by the arbitration committee without jurisdiction, the rules having been disregarded upon a question of substance.

A member of a friendly society was duly summoned before the arbitration committee for a breach of the rules, and was in his absence expelled from the society by a resolution of the committee upon a different charge, namely, of fraud and disgraceful conduct, of which no written notice had been given to him as required by the rules:—

Held, that the decision was null and void.
ANDREWS *v.* MITCHELL - - H. L. (E.) 78

GAS—Sewers rate—Gas mains liable to be rated as unsewered property—Law of Victoria - - - - - 595
See PRIVY COUNCIL APPEALS. 26.

HABEAS CORPUS — Writs of — Extradition — Arrest and remand of accused—Jurisdiction—Procedure—Release - 128
See PRIVY COUNCIL APPEALS. 4.

HARBOUR — *Boundary—"Precincts"—Removal of Sand from Foreshore—Construction of Statute—Musselburgh Harbour Act*, 1840 (3 *Vict. c. lxxiii.*), *ss.* 2, 49, 76.

By s. 2 of the Musselburgh Harbour Act of 1840 the word "harbour" shall be understood to mean the "harbour of Fisherrow," and shall include the whole precincts thereof as after specified. By s. 76 the said harbour shall be deemed to extend "along the shore" from the Magdalena Burn on the west to the Ravenshaugh Burn on the east, and to seaward to the extent of 100 yards beyond low-water mark opposite to the shore between the aforesaid burns. The distance between the two burns was two miles.

By s. 49 it shall not be lawful for any person to dig or take away from the said harbour or its precincts any sand, gravel, shingle, or stones except from such place or places as shall from time to time be appointed by the harbour commissioners. In an action by the harbour commissioners against persons who were proprietors of part of the foreshore between the two burns to restrain them from digging sand, &c.:—

Held, affirming the decision of the Second Division of the Court of Session, (1903) 5 F. 387, that the harbour and its precincts included the whole foreshore between the two burns, and that the defenders were not entitled to remove sand from their land without the authority of the harbour commissioners.

Attorney-General v. *Tomline*, (1880) 14 Ch. D. 58, followed. MUSSELBURGH REAL ESTATE COMPANY *v.* PROVOST, &c., OF MUSSELBURGH
H. L. (Sc.) 491

HIRE AND PURCHASE AGREEMENT—Loan—Inference of fact—Registration - 102
See BILL OF SALE.

HOUSE OF LORDS — *Practice — Peer's Right to be heard at the Bar—Barrister—Committee for Privileges.*

A barrister who is also a peer may argue as counsel on an appeal at the bar of the House of Lords, but may not appear as counsel to argue before Committees of the House, or before the House when sitting under the presidency of the Lord High Steward on a criminal case. *In re* LORD KINROSS - - - H. L. (Sc.) 468

HUSBAND AND WIFE — *Judgment against Married Woman — Separate Estate — Restraint against Anticipation—Income due after Judgment —Married Women's Property Act*, 1882 (*c.* 75), *ss.* 1, 19.

When judgment is obtained against a married woman payable out of separate estate held in trust for her without power of anticipation, income accrued due after the date of the judgment cannot be attached in the hands of the trustees to answer the judgment.

Whiteley v. *Edwardes*, [1896] 2 Q. B. 48, approved. BOLITHO & CO. *v.* GIDLEY
H. L. (E.) 98

—— Marriage contract — Wife's acquirenda — Accumulations of income—Legitim 285
See SCOTTISH LAW. 3.

ILLEGITIMATE CHILD—Poor law—Residence by child under sixteen with parent 450
See POOR LAW.

INDEMNITY—Forged transfer of stock—Innocent presentment for registration—Implied contract to indemnify - 392
See COMPANY. 2.

INDIA—Laws of—Bombay - - - 213
See PRIVY COUNCIL APPEALS. 13.

INJUNCTION — Trade union — Application of funds contrary to rules—Strike pay—Action for injunction by individual member - - - - 256
See TRADE UNION.

INSANITY.
See under LUNATIC.

INSOLVENT ESTATE—Distribution of—Landlord's privilege—Law of Quebec - 570
See PRIVY COUNCIL APPEALS. 11.

INTEREST — Practice — Interest intentionally omitted from final decree — Law of Ontario - - - - 590
See PRIVY COUNCIL APPEALS. 9.

IRELAND — Divorce — Decree nisi under the English Divorce Acts—Doubt as to operation in Ireland—Domicil - 314
See DIVORCE.

JERSEY—Jurisdiction of Royal Court—Laches of plaintiff - - - - 61
See PRIVY COUNCIL APPEALS. 14.

JUDGMENT—Married woman—Separate estate Restraint against anticipation—Income due after judgment - - 98
See HUSBAND AND WIFE.

JUDICATURE ACT—Debt, Equitable Assignment of—Advance of money to vendor of goods — Direction to pay price to lender - - - - 454
See DEBT.

JURISDICTION — Court of Appeal — Order for new trial unless damages reduced 115
See PRACTICE.

—— Extradition—Arrest and remand of accused —Writs of habeas corpus—Procedure—Release - - - - 128
See PRIVY COUNCIL APPEALS. 4.

—— Friendly society—Jurisdiction of arbitration committee — Dispute between member and society—Expulsion - - 78
See FRIENDLY SOCIETY.

—— Jersey, Law of — Jurisdiction of Royal Court—Laches of plaintiff - 61
See PRIVY COUNCIL APPEALS. 14.

—— Lunatic, Jurisdiction to dispense with examination of—Law of New South Wales - - - - 343
See PRIVY COUNCIL APPEALS. 17.

—— Ouster of jurisdiction—Arbitration clause—Compulsory reference — Private Act—Statutory agreement - - 421
See COMPANY. 3.

JUSTIFICATION—Procuring breach of contract —Cause of action — Interference with legal right—Malice - - 239
See CONTRACT. 3.

—— Stipendiary magistrate—Petition for inquiry into a licensing poll — Law of New Zealand - - - - 351
See PRIVY COUNCIL APPEALS. 22.

LACHES—Jersey, Law of—Jurisdiction of Royal Court—Laches of plaintiff - 61
See PRIVY COUNCIL APPEALS. 14.

LANDLORD AND TENANT—Distribution of insolvent's estate—Landlord's privilege—Law of Quebec - - - 570
See PRIVY COUNCIL APPEALS. 11.

—— Lease of land for agricultural purposes—Covenant not to sell a lease for building purposes—Breach—Forfeiture—Law of the Transvaal - - - 584
See PRIVY COUNCIL APPEALS. 1.

LANDS CLAUSES ACTS—*Compensation—Severance and injuriously affecting Land—Site of a Church—Construction of Special Railway Act—Union of Benefices Act*, 1860 (23 & 24 *Vict. c.* 142) —*Lands Clauses Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 63.

By their special Acts which incorporated the Lands Clauses Act, 1845 (except where expressly varied), a railway company were empowered to take land adjoining a church and an easement or right of using the subsoil under the church, but were prohibited from taking any part of the church. The company having given notice to treat for part of the adjoining land and the subsoil under the church :—

Held, that upon the true construction of the special Acts there was nothing to shew an intention that the church should remain in situ in perpetuity, and that in assessing the compensation to be paid by the company the arbitrator was entitled to award compensation under s. 63 of the Lands Clauses Consolidation Act, 1845, for severance or the injurious affecting of the other lands, upon the basis that the site of the church might under a scheme under the Union of Benefices Act, 1860, or otherwise at some future time cease to be the site of a church and become available for building, and that the arbitrator was at liberty to draw his own conclusion as to when that time would be likely to arrive.

The decision of the Court of Appeal, [1903] 2 K. B. 728, affirmed. CITY AND SOUTH LONDON RAILWAY COMPANY *v.* UNITED PARISHES OF ST. MARY WOOLNOTH AND ST. MARY WOOLCHURCH HAW - - - - - H. L. (E.) 1

LEASE.
See under LANDLORD AND TENANT.

—— Covenant to pay taxes—Usual covenant by lessee - - - - 33
See PRIVY COUNCIL APPEALS. 7.

LEGITIM — Marriage contract — Conquest — Wife's acquirenda — Accumulations of income - - - - 285
See SCOTTISH LAW. 3.

LICENCE — By-law — Ultra vires — Ice-cream vendor's licence — Lawful day — Edinburgh corporation - - - 21
See SCOTTISH LAW. 1.

LICENCES—For tramway cars, conductors, and drivers—Liability of tramway company —Law of Victoria - - - 353
See PRIVY COUNCIL APPEALS. 25.

LICENSING ACTS—Jurisdiction of stipendiary magistrate—Petition for inquiry into a licensing poll—Law of New Zealand
See PRIVY COUNCIL APPEALS. 22. 351

LIMITATION — Will — Intention — Forfeiture clause—Words of futurity—Limitation to events after testator's death - 106
See WILL. 1.

LIQUIDATED DAMAGES—Penalty or—Contract —Time limit—Waiver - - 6
See CONTRACT. 2.

LOAN—Hire and purchase agreement—Inference of fact—Registration - - 102
See BILL OF SALE.

LOCAL GOVERNMENT — Sanitary authority— Power to provide sanitary conveniences —Bonâ fide use of statutory powers
See LONDON. 426

LONDON — *Conveniences — Local Government — Public Health — Sanitary Authority — Power to provide Sanitary Conveniences—Bonâ fide use of Statutory Powers—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 44.

In providing sanitary conveniences under the Public Health (London) Act, 1891, s. 44, the sanitary authority must use their statutory powers bonâ fide and reasonably, and if they so act their discretion as to the mode of acting cannot be interfered with.

Where the conveniences are so provided under a street with a subway it is no objection that the public can use the subway as a means of passing from one side of the street to the other.

The decision of the Court of Appeal, [1904] 1 Ch. 759, reversed upon the facts, and the decision of Joyce J., [1902] 1 Ch. 269, restored by the Earl of Halsbury L.C. and Lords Macnaghten and Lindley, Lord James dissenting. WESTMINSTER CORPORATION *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - H. L. (E.) 426

LUNACY—Substituted service on alleged lunatic —Service on Master in Lunacy—Jurisdiction to dispense with examination of lunatic—Law of New South Wales 343
See PRIVY COUNCIL APPEALS. 17.

—— Contract by insane person is void, not voidable—Rights of negotiorum gestor—Law of Natal - - - - 555
See PRIVY COUNCIL APPEALS. 15.

MALICE—Procuring breach of contract—Cause of action—Interference with legal right —Justification - - - 239
See CONTRACT. 3.

MALICIOUS PROSECUTION—Action for—Verdict set aside—New trial - - 168
See PRIVY COUNCIL APPEALS. 24.

MANCHESTER—Manchester Ship Canal Acts— Private Act — Statutory agreement — Arbitration clause—Compulsory reference—Ouster of jurisdiction - 421
See COMPANY. 3.

MARKETS — By-law — Ultra vires — Power to charge fees on cattle in municipal saleyards only—Law of New South Wales
See PRIVY COUNCIL APPEALS. 19. 161

MARRIAGE — Forfeiture clause — Intention — Words of futurity—Limitation to events after testator's death - - 106
See WILL. 1.

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MELBOURNE—Licences for tramway cars, conductors, and drivers—Liability of tramway company—Law of Victoria - 358
See PRIVY COUNCIL APPEALS. 25.

MILITARY SERVICE—Contract with the Colonial Government for—Payments by the Imperial Government — Payments under the contract - - - - 551
See PRIVY COUNCIL APPEALS. 16.

MINE—Bechuanaland, Laws of—Mining rights —Forfeiture of block of mining claims
See PRIVY COUNCIL APPEALS. 2. 139

MORTGAGE—Contract by insane person is void, not voidable—Bond passed under power of attorney granted by insane person— Law of Natal - - - 555
See PRIVY COUNCIL APPEALS. 15.

—— Sale of railway by mortgagee—Order of Court—Law of Ontario - - 576
See PRIVY COUNCIL APPEALS. 10.

MUSSELBURGH HARBOUR ACT—Boundary— "Precincts" — Removal of sand from foreshore—Construction of statute 491
See HARBOUR.

NATAL—Laws of - - - - 555
See PRIVY COUNCIL APPEALS. 15.

NEW SOUTH WALES—Laws of 66, 161, 343, 551
See PRIVY COUNCIL APPEALS. 16—19.

NEW TRIAL—Malicious prosecution, Action for —Verdict set aside - - 168
See PRIVY COUNCIL APPEALS. 24.

—— Order for, unless damages reduced—Jurisdiction of Court of Appeal - 115
See PRACTICE.

NEW ZEALAND—Laws of - 147, 176, 351
See PRIVY COUNCIL APPEALS. 20—22.

NOTICE—Act of bankruptcy—Notice to suspend payment—Stockbroker—Stock exchange
See BANKRUPTCY. 442

ONTARIO—Laws of - 33, 52, 576, 590, 601
See PRIVY COUNCIL APPEALS. 6—10.

PARTITION — Suit for partition of intestate's estate—Administrator not a party—Law of Ceylon - - - - 383
See PRIVY COUNCIL APPEALS. 12.

PENALTY—Liquidated damages or—Contract —Time limit—Waiver - - 6
See CONTRACT. 2.

POOR LAW—*Illegitimate Child—Settlement and Removal—Settlement by Residence—Irremovability —Residence by Child under Sixteen with Parent —Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35.

An illegitimate child under sixteen resided with her mother in a parish for three years in such manner and under such circumstances in each of those years as would, in accordance with the statutes in that behalf, render her irremov-

POOR LAW—*continued.*
able. After she reached sixteen the question of her settlement arose:—
Held, that by her residence she had acquired a settlement in that parish.
The decision of the Court of Appeal, [1904] 2 K. B. 121, affirmed. WEST HAM UNION *v.* HOLBEACH UNION - - **H. L. (E.) 450**

POSSESSION—Lands surrendered to the Crown subject to subsisting contracts—Rights of Crown against trespasser—Law of New Zealand - - - **147**
See PRIVY COUNCIL APPEALS. 21.

POWER OF ATTORNEY—Bond passed under, granted by insane person—Law of Natal
See PRIVY COUNCIL APPEALS. 15. **555**

PRACTICE—*Damages—New Trial—Jurisdiction of Court of Appeal—Order for New Trial unless Damages reduced—Tort—Verdict for excessive Damages.*
When in an action of tort the jury find a verdict for the plaintiff for a sum which the Court of Appeal considers unreasonable and excessive that Court has no jurisdiction, without the defendant's consent, to order that unless the plaintiff consents to reduce the damages there shall be a new trial.
The opinion of the Court of Appeal on this point in *Belt* v. *Lawes*, (1884) 12 Q. B. D. 356, overruled. WATT *v.* WATT - **H. L. (E.) 115**

—— Appeal, Admission of—Order of Court—Appealable case—Law of Ontario **601**
See PRIVY COUNCIL APPEALS. 8.

—— Barrister—House of Lords—Peer's right to be heard at the bar - - **468**
See HOUSE OF LORDS.

—— Interest intentionally omitted from final decree—Law of Ontario - - **590**
See PRIVY COUNCIL APPEALS. 9.

—— Verdict—Absence of exact proof of cause of injury—Order setting verdict aside reversed—Laws of Canada - **72**
See PRIVY COUNCIL APPEALS. 5.

PRECATORY TRUST—Absolute gift "in confidence"—Absolute gift subject to executory gift over - - - **84**
See WILL. 2.

"PRECINCTS"—Harbour—Boundary—Removal of sand from foreshore - - **491**
See HARBOUR.

PRINCIPAL AND AGENT—*Untrue Statements by Agent—Measure of Damages—Ship.*
Where an agent employed to conduct negotiations for his principals makes an incorrect statement to them that he has concluded a contract on their behalf, the measure of damages for his breach of duty is the loss actually sustained by the principals in consequence of the misrepresentation, and does not include profits that the principals might have made if the representation had been true.
The respondents employed the appellants to find freight at a certain rate per ton for one of the respondents' ships. The appellants reported that they had concluded a bargain for the charter of the vessel. In fact, no bargain had been concluded; differences which the appellants had hoped to get rid of existed and proved invincible. Three days after the report of the transaction the respondents learned that the proposed charterers had refused to proceed with the charter. On receiving this information the respondents made no effort to look for an equally advantageous freight, but used their ship under a current contract at a much lower rate per ton. The respondents first brought an action against the alleged charterers, and then against the appellants, claiming in effect the difference between the two rates of freight as damages:—
Held, altering the decision of the Second Division of the Court of Session, (1903) 40 S. L. R. 305, that the main part of the claim was untenable, but that the respondents were entitled to damages for trouble which they had incurred, outlays on telegrams and the like; and that they were also entitled to the expenses of their action against the alleged charterers down to the closing of the record.
Cassaboglou v. *Gibbs*, (1882) 9 Q. B. D. 220; (1883) 11 Q. B. D. 797, affirmed.
Collen v. *Wright*, (1857) 7 E. & B. 301; 8 E. & B. 647, distinguished. CHR. SALVESEN & CO. *v.* REDERI AKTIEBOLAGET NORDSTJERNAN **H. L. (Sc.) 302**

—— Custom House, Obligation of agent to pass goods through - - - **66**
See PRIVY COUNCIL APPEALS. 18.

PRIVILEGE—Slander—Evidence—Statement made in witness-box and in preparing proof - - - - **480**
See SLANDER.

PRIVY COUNCIL APPEALS—AFRICA—*Transvaal—Lease of Land for Agricultural Purposes—Covenant not to sell a Lease for Building Purposes—Breach—Forfeiture—Law of the Transvaal.*
Where land was leased exclusively for agricultural purposes, with liberty to the lessee to erect the necessary buildings for residence, but not to sub-divide in order to sell or lease stands for building purposes:—
Held, that the lessor was entitled to treat the lease as null and void and eject the assignees thereof on its being shewn that they had advertised the land for sale in acre plots, and had issued plans shewing a proposed sub-division into acre plots. The breach of condition was complete without actual transfer of the plots to purchasers. SHORT *v.* TURFFONTEIN ESTATES, LIMITED - - - - - **P. C. 584**

2. —— *Bechuanaland Protectorate—Mining Rights—Rules and Regulations of the Appellant Company—Forfeiture of Block of Mining Claims—Certificate of Preliminary Registration—Law of Bechuanaland.*
Although the mining rules and regulations of the appellant company, which were the contractual terms of the respondent's holding of a block of reef claims within their concession, do not in express terms prescribe or authorize forfeiture, yet the holder's liability thereto is the only sanction of all reservations, whether of rent or otherwise, in the appellants' favour.
A certificate granted thereunder of prelimi-

PRIVY COUNCIL APPEALS—AFRICA—*contd.*

nary registration of the respondents' holding is not equivalent to a lease. The mining rights and privileges conferred by it do not fall under any head or category known to the Roman-Dutch law. The rights of the parties are governed by the terms of their contract, that is, the mining rules and regulations.

In an action for restitution of a mining block, *held*, that the appellants were under their rules and regulations entitled to declare it forfeited for non-payment of rent. TATI CONCESSIONS, LIMITED *v.* HEPPLE - - - - P. C. 139

3. —— CANADA—*British North America Act, s.* 51, *sub-s.* 4; *ss.* 3 *and* 146—*Readjustment of Representation—Construction—"Aggregate Population of Canada."*

Sect. 51 of the British North America Act, 1867, directs after each decennial census a readjustment of the representation in the Dominion House of Commons of the four provinces constituted by that Act. It provides as the rule of readjustment that Quebec shall have the fixed number of sixty-five representatives, and that each of the other provinces shall have that number which bears the same proportion to its population as sixty-five bears to that of Quebec. But its sub-s. 4 prohibits a reduction of the number of the representatives in the case of any province unless the proportion which the number of its population bore to the number of the aggregate population of Canada at the last preceding readjustment is ascertained at the then latest census to have been diminished by one-twentieth part or upwards.

Held, on a case submitted to the Supreme Court of Canada as to whether New Brunswick was protected from reduction of its members, that on the true construction of sub-s. 4 the expression "aggregate population of Canada" relates to the whole of Canada as constituted by the Act, and therefore includes, not merely the four provinces constituted by proclamation issued under s. 3, but also all the provinces subsequently incorporated and admitted into the Union by Order in Council under s. 146:

Held, also, with regard to the province of Prince Edward Island, which had under s. 146 been admitted into the Union by Order in Council directing that it should have six members, its representation to be readjusted from time to time under the provisions of the Act of 1867, that sub-s. 4 on its true construction did not protect that number from reduction until an increase thereof had been previously effected. ATTORNEY-GENERAL FOR THE PROVINCE OF PRINCE EDWARD ISLAND *v.* ATTORNEY-GENERAL FOR THE DOMINION OF CANADA. ATTORNEY-GENERAL FOR THE PROVINCE OF NEW BRUNSWICK *v.* ATTORNEY-GENERAL FOR THE DOMINION OF CANADA - P. C. 37

4. —— *Extradition—Arrest and remand of Accused—Writs of Habeas Corpus—Jurisdiction—Procedure—Release.*

The respondents having been arrested in Montreal by order of the Extradition Commissioner for an alleged extradition offence in the State of Georgia, were remanded by him for the purpose of affording the prosecution an opportunity of proving its case. Thereafter one judge

PRIVY COUNCIL APPEALS—CANADA—*contd.*

in Quebec issued on their application and then quashed writs of habeas corpus, while another judge afterwards issued similar writs and discharged the respondents from custody on the ground that no extradition offence had been disclosed against them in the proceedings before him:—

Held, that this was the question which the Extradition Commissioner had jurisdiction to investigate on the remand which he had ordered, that his remand warrant could not be treated as a nullity, that the respondents were in lawful custody, and that in consequence the judge had no jurisdiction to order their release. UNITED STATES OF AMERICA *v.* GAYNOR - P. C. 128

5. —— *Practice—Damage caused by Explosion—Verdict—Absence of exact Proof of Cause of Injury—Order setting Verdict aside reversed.*

A jury having found that an explosion occurred through the neglect of the defendant company to supply suitable machinery and to take proper precautions, and that the resulting injury to the plaintiff was not in any way due to his negligence, the verdict was upheld by the unanimous judgment of two Courts:—

Held, that an order by the Supreme Court setting aside the verdict on the ground that there was no exact proof of the fault which certainly caused the injury must be reversed. Proof to that effect may be reasonably required in particular cases; it is not so where the accident is the work of a moment, and its origin and course incapable of being detected. MCARTHUR *v.* DOMINION CARTRIDGE COMPANY - P. C. 72

6. —— *Ontario—British North America Act*, 1867, *ss.* 91, 92, *sub-s.* 10 (*a*)—*Dominion Act* (43 *Vict. c.* 67)—*Ontario Act* (45 *Vict. c.* 71)—*Powers of Dominion Legislature—Local Undertakings extended beyond Provincial Limits.*

Held, that under its Dominion Incorporating Act (43 Vict. c. 67) the respondent telephone company was entitled, without the consent of the municipal corporation, to enter upon the streets and highways of the city of Toronto and to construct conduits or lay cables thereunder, or to erect poles with wires affixed thereto upon or along such streets or highways. The scope of the respondents' business contemplated by the said Act and involving its extension beyond the limits of any one province was within the express exception made by s. 92, sub-s. 10 (*a*), of the British North America Act, 1867, from the class of local works and undertakings assigned thereby to provincial legislatures. Accordingly, Act 43 Vict. c. 67 was within the exclusive competence of the Dominion Parliament under s. 91.

Ontario Act 45 Vict. c. 71, passed to authorize the exercise of the above powers within the province, subject to the consent of the corporation, was held to be ultra vires, and could not by reason of having been passed on the application of the respondent company be validated as a legislative bargain. TORONTO CORPORATION *v.* BELL TELEPHONE COMPANY OF CANADA P. C. 52

7. —— *Ontario—Lease of Land—Covenant to pay Taxes—Usual Covenant by Lessee.*

Where an agreement between the appellant railway and the respondent corporation provided

PRIVY COUNCIL APPEALS—CANADA—*contd.*
for a renewable lease from the latter to the former of a large tract of land for railway purposes, but was silent as to payment of taxes by the appellant:—

Held, that the lease should contain a covenant by the appellant to pay the same, partly because the effect of the Assessment Act in force at the date of the contract was to impose such liability on the lessees of municipal lands without recourse to the corporation, and partly because a covenant to that effect was shewn to be a usual covenant in the sense that the corporation invariably insisted on it in their leases. CANADIAN PACIFIC RAILWAY COMPANY *v.* TORONTO CORPORATION **P. C. 33**

8. —— *Ontario — Practice — Appeal, Admission of—Order of Court—Appealable Case—Law of Ontario—Revised Statutes of Ontario*, 1897, *c.* 48, *s.* 1.

Under the Revised Statutes of Ontario, 1897, c. 48, s. 1, it is essential that an appeal to the King in Council should be admitted by the Court of Appeal. The Court is bound to exercise its judgment whether any particular case is appealable or not; and where it appears by its order that it has left that question open, the appeal is incompetent. E. W. GILLETT & Co. *v.* LUMSDEN - - - **P. C. 601**

9. —— *Ontario—Practice—Order on further Directions to pay Interest on Amount Decreed—Power of Court—Discretion overruled—Interest intentionally omitted from Final Decree.*

Where a decree of the Court of Appeal affirmed by an Order in Council had ordered the repayment of moneys received by the appellant in excess of his salary as manager of a company, but was silent as to interest on the sums so overdrawn:—

Held, that the Court had power to order interest on further directions as a matter of discretion, but that as it appeared from the judgment of their Lordships that the Order in Council intentionally omitted a direction to that effect, the discretion of the Court below should be overruled. As no claim for interest was made at the commencement of the action, it should be charged only on the amount decreed from the date of the decree of the Court of Appeal. BURLAND *v.* EARLE - - - **P. C. 590**

10. —— *Ontario—Railway—Sale of Railway by Mortgagee—Order of Court—Law of Ontario—Dominion Act* 46 *Vict. c.* 24, *ss.* 14–16—*Dominion Railway Act*, 1888 (51 *Vict. c.* 29).

Held, that a railway incorporated in 1873 by an Ontario statute, and declared by a Dominion statute in 1884 to be a work for the general advantage of Canada (thereupon becoming subject to the legislation of the Dominion), can in a suit by the trustees for bond-holders to enforce a mortgage thereon be sold by virtue of the provisions contained in Dominion Act 46 Vict. c. 24, ss. 14, 15, and 16, re-enacted by the Dominion Railway Act, 1888 (51 Vict. c. 29). CENTRAL ONTARIO RAILWAY *v.* TRUSTS AND GUARANTEE COMPANY - - - - **P. C. 576**

11. —— *Quebec—Insolvent's Estate, Distribution of—Landlord's Privilege—Effect of* 61 *Vict. c.* 46—*Retrospective Legislation—Law of Lower Canada.*

Where insolvent tenants judicially abandoned their property for the benefit of their creditors and statute law (61 Vict. c. 46) at the date of the abandonment restricted the lessor's preference to two years' rent, ranking them as ordinary creditors for the balance, while no such restriction was enacted by the law as it stood at the date of the leases:—

Held, that the existing statute applied to all liquidations which arose after its enactment, and governed the lessor's privilege unless expressly excepted therefrom. ROSS *v.* BEAUDRY **P. C. 570**

12. —— **CEYLON** — *Civil Procedure Code, s.* 547—*Suit for Partition of Intestate's Estate—Administrator not a Party.*

In a suit brought in 1898 for partition, or alternatively for a sale of certain parts of an intestate's estate, it appeared that the intestate had died in 1884, that no letters of administration had been taken out, that the widow and son had made a division of the immovable estate between themselves and the other heirs and executed certain notarial deeds of gift for the purpose of effecting such division, and various dealings with their respective shares had been made by the allottees:—

Held, that the Supreme Court's decree of dismissal of the suit was right.

By s. 547 of the Civil Procedure Code, which was the law in force when the action was commenced, it was not maintainable in the absence of any administrator on the record.

The action, though in form for partition, was in substance for the recovery of property within the meaning of that section.

No partition could be effected by the Court without a complete administration of the whole of the intestate's estate, which would include an account of the payment of his debts, and of the dealings of the allottees with their respective shares so as to adjust their respective rights. PONNAMMA *v.* ARUMOGAM - - **P. C. 383**

13. —— **INDIA**—*Bombay—Company—Proxy—Shareholder only to be Proxy—Nomination of unqualified Proxy—Disqualification removed before Proxy is used.*

Where one of a company's articles of association provided that "no person shall be appointed or . . . . have authority to act as a proxy who is not a shareholder of the company":—

Held, that on its true construction it is no objection to a proxy duly lodged that an unqualified person is named therein, provided that the qualification exists when the proxy is lodged and continues when it is used:

Held, further, that as the articles did not require the shareholder using the proxy to be literally "named" therein, the proxy could not be objected to if he were sufficiently described for all business purposes, as for instance a member for the time being of a specified firm. BOMBAY-BURMAH TRADING CORPORATION, LIMITED *v.* DORABJI CURSETJI SHROFF - - **P. C. 213**

14. —— **JERSEY** — *Jurisdiction of Royal Court—Parish Vote for application of Parish*

PRIVY COUNCIL APPEALS—JERSEY—*contd.*

Funds—Suit to annul a Resolution of the Parish Assembly—Laches of Plaintiff.

The civil assembly of a parish in Jersey having on September 3, 1903, voted a specific sum of money for the repairs of the church as recommended by the ecclesiastical assembly, a contract was duly made on September 17 for their execution:—

Held, that an action by the appellant brought on September 20 to declare the resolution of the 3rd illegal and void was too late, inasmuch as he did not take action till after the parish authorities had entered into their contract, though he was a member of both assemblies and knew that repairs were urgent, and that by a series of proceedings from February to September the impugned liability was in contemplation. ROBERTS *v.* EREAUT - - - - - **P. C. 61**

15. —— **NATAL**—*Contract by Insane Person is void, not voidable—Bond passed under Power of Attorney granted by Insane Person—Mortgage—Rights of Negotiorum Gestor—Law of Natal.*

By the Roman-Dutch law, which prevails in Natal, a mortgage bond passed by virtue of a power of attorney executed by an insane person is not legally enforceable where it appears that the mortgagor derived no benefit from the bond, and that the mortgagee had no knowledge of the insanity. According to the authorities of that law, a contract made by an insane person is void and not voidable only.

Where moneys so advanced are devoted to purposes beneficial to the insane person, the Roman-Dutch law recognises the equity of allowing them to be recovered, as moneys expended in good faith by his negotiorum gestor. MOLYNEUX *v.* NATAL LAND AND COLONIZATION COMPANY - - - - - **P. C. 555**

16. —— **NEW SOUTH WALES** — *Contract with the Colonial Government for Military Service—Payments by the Imperial Government—Payments under the Contract.*

Where a Colonial Government had entered into a contract with the respondent for military services in South Africa at a certain rate of pay:—

Held, that it did so on behalf of the Crown, and that any payments made by the Crown to the respondent through the Imperial Government for services so rendered to the Crown were in part discharge of moneys due under the contract, and that the Colonial Government was entitled to the benefit of them. WILLIAMS *v.* HOWARTH **P. C. 551**

17. —— *Lunacy — Substituted Service on alleged Lunatic—Service on Master in Lunacy—Jurisdiction to dispense with Examination of Lunatic—New South Wales Lunacy Act*, 1898, *s.* 106, *sub-s.* 2; *s.* 110.

By s. 106, sub-s. 2, of the New South Wales Lunacy Act of 1898, according to its true construction, personal service on an alleged lunatic of a petition by his wife to declare him of unsound mind may be dispensed with when there is evidence on which the Court can conclude that it is inexpedient.

The rules of Court provide that substituted service should be effected on "some adult inmate at the dwelling-house." Where the wife and his two attendants are the only adult inmates, it is within the jurisdiction and discretion of the Court to order service on the Master in Lunacy.

It is also within the jurisdiction of the Court under s. 110 to dispense with any examination of the alleged lunatic, if there is evidence on which it can find that it is inexpedient to examine him. *In re* MCLAUGHLIN - - - **P. C. 343**

PRIVY COUNCIL APPEALS — NEW SOUTH WALES—*continued.*

18. —— *Principal and Agent—Construction of Contract—Obligation of Agent to pass Goods through the Custom House — Action for not expediting Clearance so as to avoid a newly imposed Duty.*

Where the respondents contracted for certain fixed charges to lighter and load on railway trucks the machinery of the appellants brought by ship, and also to pass it through the Customs without extra charge:—

Held, that this obligation did not involve the duty of expediting the clearance of the appellants' goods in less than the twenty-four hours allowed by the Customs Regulation Act, 1879, so as to avoid the payment of duty, which came into force before the expiration of that time. The appellants, who sued to recover the amount of the duty so paid, had not requested that the clearing should be expedited, though the circumstances were not within the contemplation of the contract, and were rightly nonsuited. COMMONWEALTH PORTLAND CEMENT COMPANY *v.* WEBER, LOHMANN & CO. - - **P. C. 66**

19. —— *Sydney Corporation Act*, 1879, *s.* 130—*Construction—By-law No.* 10 *ultra vires—Power to charge Fees on Cattle in Municipal Sale-yards only.*

By ss. 132 and 138 of the Sydney Corporation Act of 1879 the appellants were authorized to establish and license, within certain local limits, sale-yards for the sale of cattle, and also places for the slaughter thereof; and by s. 139 they were empowered to charge fees set forth in by-laws to be made in that behalf on cattle intended for slaughter "yarded or brought for sale by auction to any sale-yards or premises in the city of Sydney or within the distance of fourteen miles therefrom as hereinbefore provided," the schedule of maximum charges being confined to animals received into the yards for sale and not referring to animals intended for slaughter:—

Held, that by the true construction of s. 139 it contemplated an owner of cattle intended for slaughter bringing them to sale-yards established by the appellants, and that a by-law authorizing charges on cattle brought by the respondents to their own private yards within the same local limits and there slaughtered was ultra vires. MUNICIPAL COUNCIL OF SYDNEY *v.* AUSTRAL FREEZING WORKS, LIMITED - - **P. C. 161**

20. —— **NEW ZEALAND**—*Land—Transfer of Native Lands—Land Transfer Acts*, 1870–1885—*Effect of Registration—Native Land Act*, 1873—*Native Lands Fraud Prevention Act*, 1881, *ss.* 4, 6, 15—*Native Land Court Act*, 1894, *ss.* 59, 73—*Fraud in procuring Registration—Errors of Procedure in Native Land Courts—Orders of*

PRIVY COUNCIL APPEALS—NEW ZEALAND —*continued.*

Freehold Tenure — Memorandum of Transfer indorsed by Trust Commissioner.

Under the system of land registry introduced into New Zealand in 1860, governed from 1870 to 1885 by the Land Transfer Act of 1870 and its amendments, and afterwards by the Land Transfer Act of 1885, registration is conclusive and confers an unimpeachable title on the registered owner except in certain specified cases, of which fraud is one.

The transfer to Europeans of lands held by natives under their native customs was till 1886 regulated by the Native Land Act, 1873, which provided for a judicially ascertained memorial of their ownership, and eventually, in case of a memorandum of transfer by them being judicially approved, for an order of freehold tenure indorsed by the Court on the memorial, the effect of which was to extinguish the native title, confer a new right on the purchaser, and authorize a Crown grant by the Governor. The Land Court had jurisdiction to make this order, by which the district land registrars under the Act of 1870 were bound. By the Native Land Court Act, 1894, s. 73, native customary land was subjected to the Land Transfer Act, 1885, and its owner made absolute proprietor subject to all equities affecting the same. The registration was thereby authorized of any transferee of an interest therein under a transfer made prior to the Act and duly confirmed.

In actions by natives to recover from the appellants three parcels of lands (subject to the Land Transfer Act, 1885) of which they were registered owners in possession, it appeared that the first parcel had been registered in the names of the appellants on production of a warrant or Crown grant dated May 7, 1889; the second under an Act of Parliament (Glasgow Bank Act, 1882) vesting in them, subject to existing liabilities, a title which had been previously registered in the names of the liquidators of the bank; the third on production of certificates of title from the Native Land Court and Crown grants:—

Held, that as the registration had been obtained in each case bonâ fide the effect thereof was conclusive to confer on the appellants a title unimpeachable by the respondents.

By the Land Transfer Acts of 1870 and 1885 the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, is actual, not constructive fraud, brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents.

Gibbs v. *Messer*, [1891] A. C. 248, distinguished.

With regard to the natives' contention that the registration was invalid by reason of the invalidity of the orders of the Native Land Court on which Crown grants or their statutory equivalents had been issued:—

Held, with regard to the first parcel, that serious errors of procedure in the Native Land Court which might have affected the validity of the order of freehold tenure made by it, on which the warrant of May 7, 1889, had been issued, could not avail to invalidate a registered title. It was not the duty of the district land registrar under the Transfer and Native Land Acts to examine its validity, but to act upon it:

Held, with regard to the second parcel, that the Glasgow Bank Act, 1882, under which these lands vested in the appellants, must be read so as to work in harmony with the Colonial Acts in force at the time and as conferring upon them the right to procure registration, their transferors having been registered as owners under the Land Transfer Act, 1870, and its amending Acts:

Held, with regard to the third parcel, that the memoranda of transfer having been approved and indorsed by the Trust Commissioner under the Native Lands Fraud Prevention Act of 1881, the effect thereof was that under s. 57 of the Native Land Court Act of 1894 the transfers were confirmed, and accordingly there was nothing to invalidate the appellants' registration. ASSETS COMPANY *v.* MERE ROIHI. ASSETS COMPANY *v.* WIREMU PERE. ASSETS COMPANY *v.* PANAPA WAIHOPI. ASSETS COMPANY *v.* WI PERE. ASSETS COMPANY *v.* TEIRA RANGINUI. ASSETS COMPANY *v.* HENI TIPUNA - P. C. 176

21. —— *Lands surrendered to the Crown subject to subsisting Contracts—Rights of Crown against Trespasser—Possession for less than Sixty Years—Law of New Zealand—Imperial Act*, 1847—*New Zealand Act* (10 & 11 *Vict. c.* 112).

In an action of ejectment by the Crown it appeared that the lands in suit had in 1845 been included in a Crown grant to the New Zealand Land Company, which thereby acquired the legal estate therein subject to an equitable estate in favour of P., resulting from a prior contract of sale made with him by the company. In 1850 the company surrendered its lands including those in suit to the Crown, which thereupon, under an Imperial Act (10 & 11 Vict. c. 112), vested in Her Majesty, "subject nevertheless to any contracts which should then be subsisting in regard to any of the said lands." No conveyance was ever made to P. by the company, and after the surrender neither P. nor any of his heirs applied to the Crown for completion of the contract. In 1870 B. entered on the lands in suit which had been left derelict, and in 1885 conveyed them to the appellant:—

Held, that according to the true construction of the above Act the lands surrendered vested in the Crown in absolute ownership, unfettered as to any portion of them by any trust cognizable and enforceable by any Court of law or equity. Even if P.'s contractual rights against the company had passed to the appellant, they were not such as a Court could enforce. The appellant was simply an intruder, who had not been in possession long enough to acquire title against the Crown. RIDDIFORD *v.* THE KING P. C. 147

22. —— *New Zealand Magistrates' Courts*

PRIVY COUNCIL APPEALS—NEW ZEALAND —*continued.*

Act, 1893—*Jurisdiction of Stipendiary Magistrate —Petition for Inquiry into a Licensing Poll— Alcoholic Liquors Sale Act of* 1895.

Although under the New Zealand Resident Magistrates Act, 1867, the jurisdiction of magistrates was purely local, yet under the Magistrates' Courts Act, 1893, stipendiary magistrates appointed thereunder do not hold office for particular districts, but possess a general jurisdiction throughout the whole Colony, controlled in practice by departmental arrangements.

Where a stipendiary magistrate receives in an official capacity in any part of the Colony a petition presented under the Alcoholic Liquors Sale Act of 1895 for inquiry into a licensing poll, and assumes the duty of dealing with it, he has jurisdiction to act.

The Act of 1895 directs the inquiry to be made in the manner prescribed by s. 48 of the Regulation of Local Elections Act, 1876, which refers to the Court of the district resident magistrate appointed under the Act of 1867 at that time in force. But, *held*, that under s. 6 of the Act of 1893 such reference must be construed as if made to a stipendiary magistrate. BASTINGS *v.* CALLAGHAN - - - - P. C. 351

23. —— **QUEENSLAND** — *Australian Commonwealth Judiciary Act*, 1903, *s.* 39, *sub-s.* 2— *Construction — Act not retrospective — Right of Appeal in Suit pending when the Act was passed.*

Held, that, assuming the right of appeal from the Supreme Court of Queensland to His Majesty in Council given by the Order in Council of June 30, 1860, has been taken away by the Australian Commonwealth Judiciary Act, 1903, s. 39, sub-s. 2, and that the only appeal thereunder now lies to the High Court of Australia, yet the Act is not retrospective, and a right of appeal to the King in Council in a suit pending when the Act was passed and decided by the Supreme Court afterwards was not taken away. COLONIAL SUGAR REFINING COMPANY *v.* IRVING - - - - - P. C. 369

24. —— *Practice — Setting aside—Action for Malicious Prosecution—Verdict set aside—New Trial.*

In discharging the verdict of a jury, the Court must be satisfied that there is such a preponderance of evidence against it as to make it unreasonable and almost perverse that the jury, when instructed and properly assisted by the judge, should have returned it.

Metropolitan Ry. Co. v. *Wright*, (1886) 11 App. Cas. 152, followed.

A verdict for damages for having been adjudged insolvent maliciously and without reasonable and probable cause was rightly set aside when it appeared that, assuming the plaintiff was not keeping out of the way of his creditors with a view to delay them, there was evidence which might lead a reasonable man to believe that he was.

The question of reasonable and probable cause should not be left to the jury, but determined by the judge on facts found by the jury. COX *v.* ENGLISH, SCOTTISH, AND AUSTRALIAN BANK, LIMITED - - - P. C. 168

PRIVY COUNCIL APPEALS—*continued.*

25. —— **VICTORIA** — *Licences for Tramway Cars, Conductors, and Drivers—Melbourne Tramway and Omnibus Company's Act*, 1883, *ss.* 22, 54 —*Liability of Tramway Company.*

Under the Victorian Licensed Carriages Statute, 1864, the Carriages Act, 1890, the by-laws made thereunder, and s. 22 of the Melbourne Tramway and Omnibus Company's Act, 1883, licences must be obtained for the cars, drivers, and conductors employed on the tramways constructed under its powers :—

Held, that the liability to pay for these licences is on the appellants, who work the tramways and are owners of the cars and employers of conductors and drivers, and that it was not by the true construction of s. 54 of the Act of 1883 and of clause 14 (4) of the agreement scheduled thereto transferred to the tramways trust, a body created to exercise the powers of the corporations constituting it in constructing or in working the tramways within their municipal limits, unless and until the trust undertakes the working of the tramways. MELBOURNE TRAMWAY AND OMNIBUS COMPANY *v.* KIDNEY. MELBOURNE TRAMWAY AND OMNIBUS COMPANY *v.* MELBOURNE CORPORATION - - - - P. C. 358

26. —— *Sewers Rate — Construction — Gas Mains liable to be rated as Unsewered Property —Law of Victoria, Act No.* 1491, *s.* 8.

The local board of works being empowered by their Act No. 1491, s. 8, to levy a rate for local purposes including sewage and drainage, and for that purpose to adopt as the rateable net annual values of the properties liable to be rated the valuation in force at the time of making the rate in the municipalities within which the properties respectively are situate, distinguishing between sewered properties and unsewered properties, the former being defined as property which abutted in whole or in part on a street in which a sewer had been laid or as connected with any of the board's sewers :—

Held, that the gas mains of the respondents did not fall within the definition of sewered property, but that, as they had been comprised and separately valued in the valuation in force in the municipalities within which they were situated, they were liable to be rated as unsewered property. MELBOURNE AND METROPOLITAN BOARD OF WORKS *v.* METROPOLITAN GAS COMPANY P. C. 595

27. —— *Trustee —Law of Victoria—Victorian Trusts Act*, 1901, *s.* 3—*Construction—Breach of Trust—Trustees not entitled to be excused— Erroneous Advice of Solicitor—Trustee Company not gratuitous Trustees.*

Under the Victorian Trusts Act, 1901, s. 3 (corresponding with the English Act 59 & 60 Vict. c. 35), a trustee may be relieved from liability for breach of trust if he has acted honestly and reasonably, and ought fairly to be excused :—

Held, that, by the true construction of this section, a trustee does not entitle himself to relief by proving that he has acted reasonably and honestly. He must shew that under all the circumstances he ought fairly to be excused for his breach of trust.

PRIVY COUNCIL APPEALS—VICTORIA—*contd.*

J. F., being entitled to the whole of his deceased wife's proportion of a fund of which the appellants became trustees, assigned the same to the respondents. Under the erroneous advice of their solicitors, in accordance with an Act which was not passed till after the wife's death, the appellants paid two-thirds of the fund to the wife's children and one-third into court under the Act for relief of trustees without question by the respondents, who accepted the appellants' statement as to their rights without verification.

In a suit by the respondents to recover the said two-thirds:—

Held, (1) that the payment thereof to the children was a breach of trust, and that it was no defence that it had been made upon erroneous advice of the solicitors.

Doyle v. *Blake*, (1804) 2 Sch. & Lef. 231; 9 R. R. 76, approved.

(2) That the respondents having accepted and acted upon the appellants' statement as to their rights was no evidence of acquiescence.

(3) That although the appellants had acted honestly and reasonably, they had shewn no title to be excused. They had made no attempt to replace the fund in whole or in part nor explained the reason for their abstention. They were not gratuitous trustees, and could not throw upon the respondents, who were not in fault, the loss of a fund which they had misapplied in the course of their business. NATIONAL TRUSTEES COMPANY OF AUSTRALASIA, LIMITED *v.* GENERAL FINANCE COMPANY OF AUSTRALASIA, LIMITED P. C. 373

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REVENUE—*Estate Duty—Entail—Property—Estate Duty paid by a deceased Heir of Entail and not specifically charged on Entailed Estates—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*a*); *s.* 9, *sub-ss.* 2, 3, 5, *and* 6; *s.* 22, *sub-s.* 2 (*a*), (*c*).

By the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2, sub-s. 1, "property passing on the death of the deceased shall be deemed to include—(*a*) property of which the deceased was at the time of his death competent to dispose." By s. 9, sub-s. 1, "The estate duty on an estate . . . . shall be a first charge on the property in respect of which duty is leviable." By sub-s. 2, "On an application . . . . the Commissioners shall grant a certificate of the estate duty paid in respect of the property." By sub-s. 3, "The certificate of the Commissioners shall be conclusive evidence that the amount of duty named therein is a first charge on the lands." By sub-s. 5, "A person required to pay the estate duty in respect of any property shall . . . . have power to raise the amount of such duty . . . . by the sale or mortgage of, or a terminable charge on, that property." By sub-s. 6, "A person having a limited interest in any property who pays the estate duty in respect of that property shall be entitled to the like charge as if the estate duty in respect of that property had been raised by means of a mortgage to him." By s. 22, sub-s. 2 (*c*), "Money which a person has a general power to charge on property shall be deemed to be property of which he has power to dispose."

An heir of entail who had paid out of his own money estate duty due in respect of the entailed estate on the death of his predecessor died without having taken any steps to charge the sum so paid on the entailed estate. The

REVENUE—*continued.*
Crown having claimed an account and estate duty on the sum so paid from his executors:—

Held, reversing the decision of the First Division of the Court of Session (Lord Robertson dissenting), (1904) 6 F. 347, that the money became automatically a statutory charge on the estate, and was placed by the statute in the same position as if the heir of entail paying the duty actually held a bond over the estate for the amount; and that accordingly the deceased heir of entail at the time of his death had a vested transmissible interest in the amount of the estate duty he had paid, and was competent to dispose of it:

Held, also, that the Finance Act of 1894 was not to be construed according to the technicalities of the law of England or Scotland, but according to the ordinary popular signification of the words employed. LORD ADVOCATE *v.* COUNTESS OF MORAY - - - - **H. L. (Sc.) 531**

2. —— *Succession Duty—Tenant for Life—Remainder in Tail—Disentailing Deed—Alienation—Succession derived from Alienee—Succession Duty Act*, 1853 (16 *&* 17 *Vict. c.* 51), *ss.* 2, 15.

A., tenant for life of real property, and B., tenant in tail in remainder, executed a disentailing deed and sold and conveyed the property to C. On C.'s death D., as C.'s devisee, became entitled in possession to the property and paid succession duty thereon. Then A. died and the Crown claimed succession duty from B. and D. as on a succession from A.:—

Held, that succession duty was payable by D., to be calculated upon the life of D.

The decisions of Ridley J., [1903] 2 K. B. 71, and the Court of Appeal, sub nom. *Attorney-General* v. *Duke of Northumberland*, [1904] 1 K. B. 762, affirmed.

In re Cooper and Allen, (1876) 4 Ch. D. 802, overruled upon this point. DUKE OF NORTHUMBERLAND *v.* ATTORNEY-GENERAL **H. L. (E.) 406**

SAND — Harbour — Boundary — "Precincts" — Removal of sand from foreshore - **491**
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SANITARY CONVENIENCES—Power to provide —Sanitary authority—Bonâ fide use of statutory powers - - - **426**
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SCOTTISH LAW — *By-law — Ultra Vires — Ice-cream Vendor's Licence—Lawful Day—Edinburgh Corporation Act*, 1900 (63 *&* 64 *Vict. c. cxxxiii.*), *s.* 80, *as amended by Edinburgh Corporation Order Confirmation Act*, 1901 (1 *Edw. 7, c. clxxxiv.*), *s.* 57.

By s. 80 of the Edinburgh Corporation Act, 1900, as amended by Edinburgh Corporation Order Confirmation Act, 1901, any person selling ice-cream (except in a duly licensed hotel) without a licence from the magistrates "who are hereby empowered to grant the same" for the house, building, or premises where such ice-cream is kept for sale or sold shall be liable to a penalty: Provided that such licence shall run from the date of issue until May 15 next ensuing, and upon renewal from the date of expiry of the licence so renewed to May 15 succeeding such expiry, "unless the same shall be sooner forfeited, revoked, or suspended," and that "every person licensed . . . . to sell ice-cream, under the provisions of this Act who shall . . . . sell ice-cream, except during the hours of" 8 A.M. and 11 P.M. "on any lawful day, or at such extended hour at night as the magistrates may by special regulation in particular cases and for reasons assigned permit," shall be liable in a penalty. No form of licence was annexed to the statute.

The magistrates proposed to issue the following licence: "(1) That the said licensee shall not keep open said premises, or sell or permit the sale of ice-cream therein, on Sunday or on any other day set apart for public worship by lawful authority. (2) That the said licensee shall not keep open said premises or sell or permit the sale of ice-cream therein before 8 o'clock in the morning or after 11 o'clock at night. (3) That the said magistrates, or any of them, may at any time suspend or revoke this licence":—

Held, reversing the decision of the Second Division of the Court of Session, (1903) 5 F. 480, that the conditions of the licence were ultra vires. ROSSI *v.* EDINBURGH CORPORATION **H. L. (Sc.) 21**

2. —— *Divorce—Wife's Costs.*

Where the wife is successful in her defence to an action of divorce the rule of the law of Scotland is to give the wife her costs as between agent and client. GRANT *v.* GRANT **H. L. (Sc.) 466**

3. —— *Marriage Contract—Conquest—Wife's Acquirenda—Accumulations of Income—Legitim—Married Women's Property (Scotland) Act*, 1881 (44 *&* 45 *Vict. c.* 21), *ss.* 7, 8.

By ante-nuptial marriage contract executed in 1848 the wife bound herself to convey to trustees the whole funds and estate real and personal which she might hereafter "conquest and acquire by purchase succession or otherwise." The trustees were directed to pay the income of the trust estate to the wife during her life for her own separate benefit and use exclusive of the jus mariti, and by a clause in the contract the provisions in favour of children were to bar any claim they might make under the head of legitim:—

Held, affirming the decision of the Court of Session, (1902) 5 F. 191, that the clause of conquest did not extend to estate which at the dissolution of the marriage by the death of the husband consisted of or was purchased with accumulations of the wife's separate income; that the only child of the marriage was not entitled to legitim out of his mother's estate. MACKENZIE *v.* ALLARDES - **H. L. (Sc.) 285**

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SEPARATE ESTATE — Married woman — Restraint against anticipation — Income due after judgment - - 98
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SETTING ASIDE—Malicious prosecution, Action for—Verdict set aside—New trial 168
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SETTLED LAND—Succession duty—Tenant for life—Remainder in tail — Disentailing deed—Alienation — Succession derived from alienee - - - 406
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SETTLEMENT—"Charitable or religious institutions and societies"—Uncertainty—Trust disposition and settlement
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—— Marriage contract — Conquest — Wife's acquirenda—Accumulations of income —Legitim - - - - 285
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SEWERS—Rate—Gas mains liable to be rated as unsewered property—Law of Victoria
See PRIVY COUNCIL APPEALS. 26. 595

SHAREHOLDER—Only to be proxy—Nomination of unqualified proxy—Disqualification removed before proxy is used
See PRIVY COUNCIL APPEALS. 13 213

SHIPPING—*Bill of Lading—Construction—Exceptions—Warranty as to Seaworthiness.*

Frozen meat shipped for carriage from Melbourne to London arrived tainted with carbolic acid, with which the ship had been disinfected before shipment. The bill of lading contained two exception clauses. The first exempted the shipowner from liability for damage to goods whether arising from a defect existing at the time of the shipment or not, or from the neglect of the master or crew or from any other cause whatsoever. The second clause also exempted the shipowner from liability for damage from defects, &c., "if reasonable means have been taken to provide against such defects and unseaworthiness":—

Held, that upon the true construction of the bill of lading the liability of the first clause was qualified by the second clause, and that, reasonable care not having been taken in cleansing the ship before shipment, the shipowner was liable for the damage in an action brought by an indorsee of the bill.

The decision of the Court of Appeal, [1904] 1 K. B. 319, affirmed. ELDERSLIE STEAMSHIP COMPANY, LIMITED *v.* BORTHWICK H. L. (E.) 93

2. —— *Charterparty — Damages for Detention—Reasonable Time for loading—Obligation to have Cargo ready—Custom of Port.*

By a charterparty dated May 30, 1900, which

SHIPPING—*continued.*

did not fix the time within which the vessel was to be loaded, the steamship *Ardandearg*, of which the plaintiffs were owners, was chartered by the defendants to proceed to such loading berth as the freighters might name at Newcastle, New South Wales, and after being in loading berth as ordered to load "in the usual and customary manner" a full and complete cargo of Australian coal, "as ordered by the charterers, which they bind themselves to ship (except in case of riot, strikes, &c., or any other accidents or causes beyond the control of the charterers, which may delay her loading)." By the custom of the port of Newcastle a vessel was not allowed to occupy a loading berth until she had received a loading order from a colliery. These orders were issued in turn, and there were no facilities for storing coal at the port. The *Ardandearg* arrived at her destination on July 14, 1900, and was ready to load; but there was no cargo ready for her until August 13, and then not enough. She had twice to be removed from her berth under a regulation of the port that a vessel must not occupy a berth when not loading, and her loading was not completed until August 23. The plaintiffs claimed damages for the detention of the vessel owing to the delay in providing the cargo:—

Held, reversing the decision of the First Division of the Court of Session, (1904) 6 F. 294, that the defendants were liable in damages on the ground that it was their primary duty as charterers to furnish the stipulated cargo; and there was nothing to be found in the charterparty or the evidence which qualified this absolute obligation. ARDAN STEAMSHIP COMPANY *v.* ANDREW WEIR & Co. - H. L. (Sc.) 501

3. —— *Contract of Carriage—Breach of Contract—Measure of Damages.*

The plaintiffs, manufacturers of wood-pulp at Stocka, Sweden, entered into a charterparty dated January 20, 1900, with the defendants, shipowners of Glasgow, by which the latter agreed to carry 900–1000 tons of wood-pulp from Stocka to Cardiff, the cargo to be lifted in two shipments—"One in May (F.O.W.). The second in August-September (owner's option)." The ship was to have liberty to call at any port or ports in order to tow and assist vessels in distress, and to deviate for the purpose of saving life or property; the owners to wire shippers of the cargo, Ströms Bruks, Stocka, six days' notice of readiness; also ship's departure from last port. The contract was made by the plaintiffs with the view of enabling them to fulfil a contract, dated December 4, 1899, for the sale and delivery of 900–1000 tons of wood-pulp to T. Owen & Co., Cardiff. The memorandum of sale contained a column of printed notes, opposite which were written particulars of the special terms of the contract. Against the note "Mode and place of delivery" were the words "C.i.f., Penarth Dock, Cardiff," and against the note "Time of delivery" the words "In two cargoes, first open water, and August-September, 1900." The first cargo, consisting of 500 tons, was duly forwarded and accepted by T. Owen & Co.; but the defendants wholly failed to fulfil their contract with regard

SHIPPING—*continued.*

to the second shipment, whereby the plaintiffs were unable to complete their contract with T. Owen & Co., who bought in against them 367 tons in several parcels in Manchester, Liverpool, and London. The plaintiffs having paid T. Owen & Co. the amount of their claim in respect of the goods so bought in, brought their action to recover from the defendants the amount paid by them:—

Held, reversing the decision of the First Division of the Court of Session, (1904) 6 F. 486, that the appellants were entitled to recover; that the proper measure of damages was the cost of replacing the goods at their place of destination at the time when they ought to have arrived, less the value of the goods in Sweden and the amount of the freight and insurance; and that the plaintiffs' right to damages would not be affected even if it were assumed that the dates of delivery in their contract with the defendants did not exactly coincide with those in their contract with T. Owen & Co. STRÖMS BRUKS AKTIE BOLAG *v.* JOHN & PETER HUTCHISON - **H. L. (Sc.) 515**

—— Ship — Untrue statements by agent — Measure of damages - - **302**
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—— Ship—Workmen's compensation—Seaman —Employment on a ship afloat in a dock Undertaker - - - - **220**
See EMPLOYER AND WORKMAN. 3.

SLANDER — *Evidence — Privilege — Statement made in Witness-box and in preparing Proof—Defamation.*

The privilege which protects a witness from an action of slander in respect of his evidence in the box also protects him against the consequence of statements made to the client and solicitor in preparing the proof for trial.

Judgments of the Second Division of the Court of Session, Scotland, (1904) 42 S. L. R. 213, reversed. WATSON *v.* M'EWAN. WATSON *v.* JONES - - - - **H. L. (Sc.) 480**

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TRADE UNION—*Application of Funds contrary to Rules—Strike Pay—Action for Injunction by Individual Member—"Directly enforcing Agreement"—Trade Union Act*, 1871 (34 & 35 *Vict. c.* 31), *s.* 4.

A trade union was established for objects which included payment to members locked out or on strike. The whole of the funds were to be applied in carrying out the specified objects according to the rules. The union misapplied part of the funds by payments of strike money in cases not authorized by the rules. An indi-

TRADE UNION—*continued.*
vidual member having brought an action against the union, its trustees and some of its officials, for an injunction restraining them from making the payments:—

Held, by the Earl of Halsbury L.C. and Lords Macnaghten, Robertson, and Lindley, Lords Davey and James dissenting, that the action was not instituted with the object of "directly enforcing" an agreement for the application of the funds to provide benefits to members within the meaning of the Trade Union Act, 1871, s. 4, the object being not to apply but to prevent misapplication of the funds, and that the action was maintainable.

The decision of the Court of Appeal, [1903] 1 K. B. 308, affirmed. YORKSHIRE MINERS' ASSOCIATION *v.* HOWDEN - - H. L. (E.) 256

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See under HUSBAND AND WIFE.

WILL—*Forfeiture Clause—Marriage—Words of Futurity—Limitation to Events after Testator's Death—Will—Construction—Intention.*

A testator by will left property in trust for his children, and declared that if any son or daughter should alienate his or her share or become bankrupt, or marry a person of any degree of kindred unless more remote than third cousin, or if a daughter marry without the previous written consent of the trustees, his or her share and interest should "thenceforth cease and determine." A daughter married a first cousin between the date of the will and the testator's death:—

Held, that, upon the true construction of this particular will, the testator intended that as to marriage the forfeiture should take effect only in the case of a marriage after the testator's death, and that the daughter had not forfeited her interest.

The decision of the Court of Appeal, [1904] 1 Ch. 431, affirmed. CHAPMAN *v.* PERKINS H. L. (E.) 106

2. —— *Precatory Trust—Absolute Gift "in Confidence"—Executory Gift over in Default of Disposition by Will of Absolute Donee—Absolute Gift subject to Executory Gift over—Construction of Will.*

A testator gave devised and bequeathed to his wife "the whole of my real and personal estate and property absolutely in full confidence that she will make such use of it as I should have made myself and that at her death she will devise it to such one or more of my nieces as she may think fit and in default of any disposition by her thereof by her will or testament I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces":—

Held (by the Earl of Halsbury L.C. and Lords Macnaghten, Davey, James and Robertson,

WILL—*continued.*

Lord Lindley dissenting), that upon the true construction of the will there was an absolute gift of the testator's real and personal estate to his wife subject to an executory gift of the same at her death to such of his nieces as should survive her, equally if more than one, so far as his wife should not dispose by will of the estate in favour of such surviving nieces, or any one or more of them.

The decisions of Kekewich J. and the Court of Appeal, *In re Hanbury*, [1904] 1 Ch. 415, reversed. COMISKEY *v.* BOWRING-HANBURY
H. L. (E.) 84

3. —— *Uncertainty—Trust Disposition and Settlement — "Charitable Religious Institutions and Societies."*

A testator directed his trustees to divide a portion of the residue of his estate to and among such "charitable or religious institutions and societies" as they might select:—

Held, reversing the decision of the Second Division of the Court of Session, (1904) 6 F. 285, that the bequest was void for uncertainty GRIMOND (OR MACINTYRE) *v.* GRIMOND
H. L. (Sc.) 124, 603

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